

# MALAYSIA HUMAN RIGHTS REPORT 2023

CIVIL AND POLITICAL RIGHTS



# REFORM OR REGRESS?



# MALAYSIA HUMAN RIGHTS REPORT 2023



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# FOREWORD

## **Civil Society is Critical in the Struggle for Truth and Justice**

Human rights organisations are at the forefront of the struggle for the protection and respect of human rights. Their bravery and commitment to social justice are essential if we aim to live in a better world. The work of Suara Rakyat Malaysia (SUARAM) stands as a testament to this cause, which is evidenced through the SUARAM annual report.

For over 35 years, SUARAM has continued to promote and protect human rights in the country, in spite of human rights restrictions and particularly the intimidation and harassment of civil society organisations. Such practices by the government continued largely unabated over the years. In 2016, when we launched the CIVICUS Monitor to track and monitor civic space developments at a global level, the reports about the human rights situation in Malaysia were still dire. The government was attacking civil society and using restrictive legislation to suppress dissent. In 2018, Malaysia underwent the first historic change of administration following the 14th General Elections. The Pakatan Harapan coalition, led by Mahathir Mohamad, won the election on a manifesto of reform. Civil society organisations, including SUARAM, quickly jumped upon the rare opportunity provided by a government long overdue for transition, and highlighted the need for structural reforms if Malaysia were to indeed veer away from the repressive path taken previously. The hope that came from this change quickly vanished, as it became clear that there was a lack of political will to undertake reforms and instead the coalition continued the legacy of the preceding government with sustained human rights violations.

More than five years later, with diverse challenges due to the COVID-19 pandemic and political instability, Malaysia's human rights record continues to be challenging under the Anwar Ibrahim government, and the need for SUARAM is more vital than ever.

In monitoring the state of civic freedoms globally, our data shows that everywhere, almost without exception, respect for these rights is deteriorating. According to the CIVICUS Monitor, only 2 percent of the world's population lives in countries where civic space is upheld and respected. More than 80 per cent of the population, on the other hand, face increased restrictions on exercising fundamental freedoms. The Asian region mirrors this worrying trend, as the majority of countries seriously restrict civic space.

Despite what may seem like a bleak picture, through my work, I have also been reassured that civil society continues to push back, undeterred by restrictions and have gained important victories. The same holds for Malaysia and the work of organisations like SUARAM. The importance of data-driven advocacy and the work of SUARAM is immeasurable. At the same time, I know that this annual report now serves as a form of truth telling on behalf of the victims of human rights violations and as evidence that provides a pathway towards justice and reparations.

I am convinced that Malaysia will one day enjoy a free and equal society where human rights are respected, with the work of SUARAM being fundamental to getting there. May this vital work continue, to document, hold the government accountable, and inspire others.



**Marianna Belalba Barreto**  
**Civic Space Cluster Lead at CIVICUS**

# EXECUTIVE SUMMARY

After three years of political and socioeconomic uncertainties, the unity government with its proclaimed commitments for reform was a source of hope for many Malaysians. There is increased receptivity by the current administrations to engage with civil society on human rights issues. Commitments to legislative reform were also made. Despite this, substantive progress in creating an enabling environment for not only regular Malaysians to fully exercise their civil and political rights, but also vulnerable groups to live without fear and violence, remains limited.

Laws that violate the **right to fair trial** continue to be applied. SUARAM documented 3220 cases of arrests, detention and charges related to human trafficking under the Security Offences (Special Measures) Act 2012 (SOSMA). For the first time since its inception, SOSMA was used to arrest and detain drug syndicate members, which is concerning when existing laws such as the Dangerous Drugs Act 1952 are adequate. The protracted wait of at least two years by detainees in prison for trial persists, though this is cut short by a year for 23 detainees in the Geng 08 GST case. 1012 arrests were made under the Dangerous Drugs (Special Preventive Measures) Act 1985 (DD(SPM)A) in 2023. Despite longstanding calls for amendments and repeal to SOSMA, progress on that front remains slow. Though the government is receptive to amending SOSMA, no explicit timeline is yet given. Tarrying further only results in continued violation of the fundamental right to fair trial, and most importantly, the fulfilment of social and economic rights of families of detainees.

Realisation of **right to justice** remains precarious for individuals and families affected. SUARAM documents 14 death-in-custody (DIC) cases this year, with more than 85% of them under police custody. This does not reflect actual DIC prevalence, due to the longstanding issue of lack of data transparency. Access of justice for families involved is also challenging and protracted. SUARAM noted six past DIC cases of which final court proceedings took place in 2023, with families pursuing justice for as long as 10 years. There is no commitment by the current administration to improve the Independent Police Conduct Commission Act 2022 (IPCC) - one of the pledges by the Pakatan Harapan coalition in its election manifesto in 2022.

Significant regression is seen in **freedom of expression**. Key laws such as the Sedition Act 1948 and Section 233 of the Communications and Multimedia Act 1998 continue to be enforced. More explicit measures such as warnings by members in government and the setup of an investigation task force were implemented to exert more restrictive control over discourse related to race, religion and royalty. Five bans were enacted under the Printing Presses and Publications Act 1984, comprising four books and the Swatch Pride watch. Raids on two bookstores were conducted, confiscating 10 books that were not on the banned book list. Threats to student autonomy in universities and artistic freedom remain palpable.

Restrictions to exercise **freedom of peaceful assembly** persist. Investigations against organisers and/or participants after, and in some cases, before public assemblies, persist.

SUARAM documented the number of individuals investigated to be at least 91 this year. Tactics seen in previous years such as police barricade, arrest and detention of individuals and pre-rally warnings are still used in public assemblies organised by the political opposition or held in significant public spaces such as Parliament. SUARAM documents a case of state intimidation and reprisal, in which an activist was charged in court despite being the victim of use of force by an enforcement official during the protest.

Amendments to the **National Human Rights Commission of Malaysia (SUHAKAM)** Act were passed in 2023, marking a significant step forward in strengthening the NHRI. This is especially needed when the institution's credibility was undermined by the former Chairperson's allegations of racial discrimination in staff appointment and subsequent defamation suit filed against a whistleblower for lodging an internal complaint on the matter.

Six state elections and five by-elections were held this year. Abuse of government resources persists, due to the lack of strong legal frameworks to define and circumscribe powers of caretaker and non-caretaker governments. Crucial electoral and parliamentary reforms, namely malapportionment, constituency development fund and the reinstatement of local government elections, remain pending.

**Freedom of religion and belief** is still restricted, in light of selective application of blasphemy laws, as well as longstanding practices of prosecution of religious minorities and moral policing by state religious authorities.

In **corruption and governance**, commitment to legislative reform is seen in the passing of the Public Finance and Fiscal Responsibility Act 2023 and ongoing drafting of the Ombudsman Bill, but no timeline for reform is given on the separation of the offices of the Attorney-General and the Public Prosecutor. The government's commitment to tackling corruption and governance is also diluted by the extension of Chief Commissioner Azam Baki's tenure within the Malaysian Anti-Corruption Commission and continued lack of transparency in government-linked company political appointments. The **Judiciary Review**, on the other hand, explores fundamental questions concerning the role of the Attorney General, independence of the judiciary and the conundrum of whether Malaysia is a secular state.

Preliminary efforts are undertaken by the government to improve the welfare of **migrants and refugees**, such as the launch of forced labour guidelines and the commitment to implement a policy for refugees that will give them access to employment, health and education. Nevertheless, such efforts will not come full circle, when investigations and raids by law enforcement persist and political will to align with global human rights standards on migrant and refugee protection is still lacking.

Human rights of **LGBTIQ and gender-diverse people** continue to regress in 2023, as evidenced by wide-ranging state-led efforts that restrict their rights. This is seen in a spike in censorship of LGBTIQ expressions, increase in violence including hate speech, introduction of anti-LGBT Syariah laws and expansion of conversion practices. At least two murders of trans women were documented.

One of the biggest milestones Malaysia achieved in 2023 is the passing of the Abolition of Mandatory **Death Penalty** Bill 2023 (DR7) and the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023. The corresponding chapter not only takes a walk down memory lane on the path to abolition, but also provides insights on developments and challenges in the resentencing process for those on death row.

In the face of climate disasters faced by Malaysia such as floods and heatwaves, the nation's ability to effectively tackle them remains limited, due to climate and welfare policies that are not yet fully responsive to the Rakyat's needs. As Malaysia undertakes green transition, there is also the need to strengthen accountability frameworks to safeguard environmental rights, including those of environmental human rights defenders.



RIGHT TO FAIR TRIAL

# RIGHT TO FAIR TRIAL

SUARAM

In the wake of the reactivation of Section 4(5) of the Security Offences (Special Measures) Act 2012 (SOSMA) and subsequently change in government administration after the 15th General Election, no tangible policy development was seen in the detention of trial laws, namely SOSMA, the Prevention of Crime Act 1959 (POCA), the Prevention of Terrorism Act (2015) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (DD(SPM)A). Whilst the government engaged with various stakeholders to review SOSMA, proposed amendments were still studied as of 20 November 2023<sup>1</sup>, with no explicit timeline given with regards to the tabling and passing of these amendments.

There have also been no changes in use of detention without trial laws. SOSMA is still widely used to curb human trafficking. Whilst organised crime is another category in which SOSMA is prevalently used, no corresponding news reports have surfaced based on SUARAM's preliminary media monitoring efforts. DD(SPM)A is, as usual, applied alongside the Dangerous Drugs Act 1952 (DDA52) in national, state and district-level anti-drug operations by the police. No news reports on investigations, arrests, detention, or charges under POCA and POTA were found.

## Number of SOSMA Arrests/Detention Between 2022 and 2023

Source (Year Covered)	SOSMA	POCA	POTA	DD(SPM)A	Total
Govt data parliamentary question (2022) <sup>2</sup>	624	132	1	--	757
Media monitoring (2022)	116	133	0	1261	1246
Govt data parliamentary question (2023)	--	2153	--	--	2153
Media monitoring (2023)	3220*	0	0	1012	4232

*\*There may be more detainees, as there are two media reports that do not provide specific numbers of SOSMA detainees*

Media reported case numbers on investigations and arrests under SOSMA in 2023 are higher than those from official data disclosed by the Home Minister Saifuddin Nasution on 2 March 2023 via a parliamentary question, as well as cases compiled from the previous year's media monitoring efforts. For POCA cases, contrary to having none reported by the media in 2023, case numbers were consistent above 130 across both official data and media reporting in 2022. Similar to 2023, no POTA cases emerged in the media last year. As for DD(SPM)A investigations, arrests and detention, media reported case numbers in 2023 was 24.6% less than in 2022.

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<sup>1</sup> The Home Minister's reply to the parliamentary question by Damansara member of Parliament on the status of SOSMA amendments

<sup>2</sup> Oral Question in Parliament, Question 28, 2 March 2023

Detention of suspects for offences committed under POCA, POTA and DD(SPM)A are stipulated within these Acts.

	<b>POCA</b>	<b>POTA</b>	<b>DD(SPM)A</b>
<b>Arrest</b>	24 hours	24 hours	24 hours
<b>Remand/Detention Period</b>	21 + 38 days	21 + 38 days	60 days
<b>Authority to Issue Remand Order</b>	Magistrate	Magistrate	None. Upon arrest, detained in police custody
<b>Authority to Issue Detention Order</b>	POCA Board	POTA Board	Home Minister
<b>Bail</b>	None	None	None
<b>Duration of Detention Order*</b>	Not exceeding 2 years  Renewable	Not exceeding 2 years	Not exceeding 2 years  Renewable, but not more than 2 years at a time

For detainees arrested for offences under the Penal Code, procedures for detention are stipulated in the CPC and SOSMA.

<b>CPC</b>		<b>SOSMA</b>
24 hours	<b>Arrest</b>	24 hours
7 or 14 (depends on severity of offence)	<b>Remand/Detention Period</b>	28
None	<b>Pre-trial detention</b>	Yes
Depends on offence	<b>Bail</b>	None (unless woman, child or deemed sick/infirm)
Depends on offence	<b>Sentence</b>	Depends on offence

### **Security Offences (Special Measures) Act 2012**

SOSMA is a procedural law that operates in lieu of the Criminal Procedural Code when an individual is detained under suspicion of offences under Chapter VI, VI A and VI B of the Penal Code; Anti-Trafficking in Person and Anti-Smuggling of Migrants Act 2007 (ATIPSOM); and Special Measures Against Terrorism in Foreign Countries Act 2015.

Many provisions in SOSMA blatantly violate an individual's right to fair trial. Under Section 4(5) of this procedural law, for example, the police can detain an individual for up to 28 days, without needing to bring the detainee before a magistrate to obtain a remand order. This contravenes the remand procedure under the Criminal Procedure Code (CPC), whereby an individual who has committed an alleged crime can only be remanded for a period of seven days or 14 days in total, depending on the severity of the offence. In addition, as stipulated in Section 13(2) of SOSMA, detainees are, by default, not granted bail when they are charged in court, unless they are below 18 years old, a woman, sick or infirm. The public prosecutor is thus granted absolute power to determine whether a

person should be granted bail. Under CPC, on the other hand, there is judicial discretion in granting bail.

SOSMA also differs from POCA, POTA and DD(SPM)A by affording detainees an opportunity to defend themselves in court. This does not detract from the procedural law's provisions that severely violate international standards on right to fair trial. Examples include extended pre-trial detention or remand during which torture and ill-treatment are used as part of standard operating procedures; denial of access to legal counsel and family members up to 48 hours<sup>3</sup>; restrictions on the admissibility of evidence and documents deemed as sensitive; admissibility of protected witnesses who can be questioned without the presence of the accused or their counsel; and several other issues of concern involving the use of agent provocateurs and confessions.

#### SUARAM-Documented SOSMA Arrests/Detention Over Five Years

Year	Terrorism	Trafficking/Immigration	Organised Crime	Unidentified	Total
2019	73	28	22	0	123
2020	13	629	184	2	828
2021	1	63	81	1	146
2022	0	73	43	0	116
2023	0	3209	11	0	3220

At a glance, investigations, arrests, detention and charges under SOSMA in 2023 broadly mirror post-2019 trends, in that SOSMA has been predominantly used to address human trafficking, and significantly lesser or none at all for terrorism-related activities. The arrest and investigations of 3154 'illegal immigrants' of various nationalities by the Immigration Department from January to mid-September 2023 under the Immigration Act 1959/63, SOSMA and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) 2007 is especially noteworthy. Arrest/detention figures do not include the media report on 14 September 2023 without specified numbers of individuals detained under SOSMA. Saifuddin briefly stated that SOSMA was invoked for investigations in the non-radioactive rare earth element mineral theft scandal in Kedah, due to detection of forced labour and human trafficking elements<sup>4</sup>.

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<sup>3</sup> Section 5(2) of SOSMA

<sup>4</sup> Mohamed Basyir, 'Police find forced labour, human trafficking acts in NR-REE scandal' (New Straits Times, 14 September 2023)

<<https://www.nst.com.my/news/nation/2023/09/955407/police-find-forced-labour-human-trafficking-acts-nr-ree-scandal>> accessed

10 November 2023

For the first time, SOSMA is concerningly used to detain members of a drug syndicate in Sabah.

### **Geng Upik**

On 25 December 2023, 10 members of Geng Upik, a drug trafficking syndicate in Sabah, were arrested and detained under SOSMA<sup>5</sup>. The arrest and detention were the result of several raids carried out simultaneously in Kota Kinabalu, Tawau and Semporna. The leader of the syndicate was among the arrested, and he was previously charged under Section 3(1) of DD(SPM)A. Four days later, another individual was also arrested and detained<sup>6</sup>. Aside from SOSMA, investigations were also carried out under Section 130V of the Penal Code and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities (AMLATFPUAA) Act 2001.

Two of the arrested individuals were enforcement officers.

The Deputy Inspector-General of Police (DIGP) Dato' Sri Ayob Khan bin Mydin Pitchay claimed that the use of SOSMA was necessary, as “certain laws are seen as less effective given that it is hard to nab syndicate leaders or masterminds as they are not involved directly in the drug activities”.

The difficulty to apprehend syndicate leaders is not justified when the police appeared to have adequate leads from preliminary investigations (e.g., the syndicate’s modus operandi and transnational activities) - for which the usual remand process with necessary extensions under the CPC would suffice. It is also noteworthy that the DIGP has had success busting a transnational syndicate without using SOSMA in 2022 while he was still police chief of Johor – all suspects were remanded for seven days for investigations under relevant provisions under the Dangerous Drugs Act 1952 and Poisons Act 1952. To use SOSMA, a procedural law with woefully inadequate fair trial safeguards, when the Dangerous Drugs Act 1952 is already sufficient for enforcement purposes of drug trafficking, marks a dangerous slippery slope to more draconian enforcement that disregards fair trial standards.

Among four SOSMA cases documented by SUARAM in 2023 that involved women detainees, only one was charged in court within the year, with bail granted to the woman. On the other hand, this exception was not upheld in another case involving a non-Malaysian woman detainee who was detained since 2022.

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5 'Drug syndicate leader among 10 nabbed by cops in Sabah' (Malaysiakini, 27 December 2023)

<<https://www.malaysiakini.com/news/691246>> accessed 1 March 2024

6 Farik Zolkepli, 'Cops seize more than RM7mil worth of assets belonging to Sabah drug syndicate' (The Star, 8 January 2024) <

<https://www.thestar.com.my/news/nation/2024/01/08/cops-seize-more-than-rm7mil-worth-of-assets-belonging-to-sabah-drug-syndicate>> accessed 1 March 2024

### **Divina Gutierrez Sanchez**

Divina, a Filipino national, sought bail on 31 January 2023 at the Sessions Court, but this application was refused by the judge. Divina was initially charged under Section 26A of ATIPSOM 2007 on 28 December 2022 for smuggling two Filipino women at Kota Belud. Her lawyer then filed a revision at the Kota Kinabalu High Court, and the Sessions Court ruling was overturned. The High Court judge ruled that the bail exception applied to Divina, who is a female applicant, as Section 26A of ATIPSOM 2007 is encompassed in the First Schedule to SOSMA<sup>7</sup>.

Aside from the Geng Upik case, there were two other media-reported cases that involved enforcement officers.

- One involved a police corporal. On 13 February 2023, Syed Shaifful Amri Syed Solihuddin was charged under Section 26B (d) of ATIPSOM 2007, which is an offence under SOSMA<sup>8</sup>. The charge entailed two counts of smuggling 29 Myanmar migrants that took place on 16 January 2023.
- The other involved 6 Immigration officers in connection with an alleged syndicate smuggling illegal Filipino migrants into Peninsular Malaysia. They were initially remanded for six days by the Malaysian Anti-Corruption Commission (MACC) for investigations, and eventually released on bail on 30 March 2023 under Section 49(2) of the MACC Act 2009<sup>9</sup>. Less than five hours later, they were arrested by the police under SOSMA for investigations under Section 26A of ATIPSOM 2007.

<b>Date of Arrest</b>	<b>No. Detained</b>	<b>Nationality</b>	<b>Gender</b>	<b>(Alleged) Offence</b>	<b>Case Status</b>
16 Jan	1	Malaysian	Male	Aggravated offence of smuggling 29 migrants	Charged
30 Jan	9	1 Malaysian 8 non-Malaysians	5 males 4 females	Smuggling of migrants	Detained
31 Jan	1	Malaysian	Male	Smuggling of migrants	Detained

7 Durie Rainer Fong, 'KK High Court frees Filipina from Sosma detention on bail in landmark decision' (The Star, 3 March 2023)

<<https://www.thestar.com.my/news/nation/2023/03/03/kk-high-court-frees-filipina-from-sosma-detention-on-bail-in-landmark-decision>> accessed 10 November 2023

8 'Police corporal charged with smuggling 29 Myanmar migrants' (The Star, 13 February 2023)

<<https://www.thestar.com.my/news/nation/2023/02/13/police-corporal-charged-with-smuggling-29-myanmar-migrants>> accessed 10 November 2023

9 'Nine held under Sosma over alleged smuggling of Filipino migrants' (The Star, 30 March 2023)

<<https://www.thestar.com.my/news/nation/2023/03/30/nine-held-under-sosma-over-alleged-smuggling-of-filipino-migrants>> accessed 10 November 2023

10 Feb	8	Malaysian	6 males 2 females	Smuggling of 20 migrants	Detained
18 Feb	1	Non-Malaysian	Male	Smuggling of 97 illegal immigrants	Detained
16 Mar	1	Malaysian	Male	Smuggling of 6 illegal immigrants	Detained
28 Mar	2	Malaysian	1 male 1 female	Smuggling of a Sri Lankan child	Charged Bailed
30 Mar	9	--	4 males 5 females	Smuggling of migrants	Detained
2 May	4	Malaysian	Male	Smuggling of 20 migrants	Charged
28 May	2	Malaysian	Male	Smuggling of 23 illegal immigrants	Detained
30 June	10	5 Malaysian 5 non-Malaysians	Male	Smuggling of 35 migrants	Charged
25 July	4	Malaysian	Male	Smuggling of 9 migrants	Detained
15 Aug	2	Non-Malaysian	Male	Smuggling of 11 migrants	Charged
14 Sep	--	--	--	Smuggling of migrants	Arrested
19 Sep	3154	Non-Malaysian	--	--	Arrested
10 Oct	1	Malaysian	Male	Smuggling of 7 illegal immigrants	Arrested
25 Dec	11	Malaysian	Male	Members of drug syndicate in Sabah	Detained

### *Long Wait by SOSMA Detainees for Court Hearing*

The **Geng 08 GST case** is a significant case. SUARAM's 2022 Malaysia Human Rights Report documented the arrest and detention of 35 men on 23 June 2022 under SOSMA for then alleged offences under Section 130V(1) of the Penal Code. After being brought to the Sessions Court in July 2022 to be charged, multiple delays took place between late August and early December 2022 before a hearing date was set – i.e., between July and September 2024, *two years from the date of arrest*. Such arbitrary detention blatantly violates international fair trial standards. Fortunately, though, the hearing date was brought forward to December 2023 for 21 detainees, with these detainees receiving reduced jail

sentences of 2 years and 10 months from the date of arrest<sup>10</sup>. For two other detainees, bail was also granted. One was granted a discharge not amounting to an acquittal, whilst the other received a six-month jail sentence from the date of arrest after pleading guilty to the charge under Section 43 of the Societies Act 1966<sup>11</sup>.

SUARAM notes two other SOSMA cases in which *hearing dates took place more than three years after date of arrest*:

- Mohammad Zaheer Ali: On 29 November 2023, Zaheer pleaded guilty to the charge of being a member of human trafficking syndicate Geng Otong under Section 130V(1) of the Penal Code<sup>12</sup>. The hearing took place more than three years later from his date of arrest on 4 June 2020. Zaheer was sentenced to five years in jail commencing from the date of his arrest.
- Mahadi Mamat: On 12 December 2023, the High Court ordered Mahadi to enter his defence on eight counts of terrorism-related offences allegedly committed in 2019<sup>13</sup>. These counts comprised making threats to attack the Sri Maha Mariamman Temple and to kill four individuals, recruiting and providing firearms training to group members to commit terrorist acts, as well as obtaining pipe bombs and firearms to commit terrorist acts. Mahadi was arrested and detained under SOSMA in May 2019, which was more than four years ago. Dates for the defence trial were set for April 4 and 18, May 27 to 30, and June 24 in 2024.

### ***Court Appeals in 2023***

There were two court appeals by the government to respectively quash a ruling to compensate a former detainee and increase the prison sentence of current detainees. The former is still pending in outcome, whilst the other was dismissed.

- On 11 January 2023, the Court of Appeal fixed 13 July 2023 to hear the authorities' appeal to overturn the High Court's ruling for them to pay Khairuddin Abu Hassan RM300,000 for his 62-day detention linked to 1MDB in 2015. The hearing is also for an

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10 Source is a combination of case updates provided by family members to SUARAM as well as the Facebook post by the lawyers managing the case (<https://www.facebook.com/groups/489284901655794/permalink/1457408101510131/>)

11 Section 43 of the Societies Act 1966: "Any person who is or acts as a member of an unlawful society or attends a meeting of an unlawful society or who pays money or gives any aid to or for the purpose of an unlawful society shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding three years or to a fine not exceeding five thousand ringgit or to both."

12 Mohd Farhaan Shah, 'Johor man pleads guilty to being part of organised crime syndicate, gets five years' jail' (The Star, 29 November 2023) <<https://www.thestar.com.my/news/nation/2023/11/29/johor-man-pleads-guilty-to-being-part-of-organised-crime-syndicate-gets-five-years039-jail>> accessed 1 March 2024

13 'Ex-IS man ordered to enter defence on eight terrorism-related charges' (The Star, 12 December 2023) <<https://www.thestar.com.my/news/nation/2023/12/12/ex-is-man-ordered-to-enter-defence-on-eight-terrorism-related-charges>> accessed 1 March 2024

appeal by Khairuddin to secure higher compensation than the amount awarded by the High Court<sup>14</sup>. The hearing date was subsequently rescheduled to 6 March 2024<sup>15</sup>. After making numerous reports both locally and overseas over the losses suffered by 1MDB, Khairuddin was detained from 18 to 25 September 2015 under Section 124C<sup>16</sup> of the Penal Code, and then rearrested under SOSMA and charged under Section 124L<sup>17</sup> of the Penal Code. Khairuddin's detention was ruled by the High Court to be unlawful, as Sections 124C and 124L of the Penal Code are not encompassed within the First Schedule of SOSMA<sup>18</sup>.

- On 14 February 2023, the Court of Appeal upheld the five-year prison sentence on 14 men for being members of the organised crime group 'Ayahanda Yie Tiger 99'<sup>19</sup>. The judge panel unanimously ruled that there were no grounds for interference with the Shah Alam High Court decision made in March 2021 and March 2022. The said 14 men were arrested in 2020, 2021 and 2022, and the charge against them was framed under Section 130V(1) within Chapter VI B of the Penal Code, an offence encompassed within the First Schedule of SOSMA. The gang ringleader was a civil servant, who was also previously linked to the shooting and subsequent injury of the driver of a former Attorney General in 2017<sup>20</sup>.

### *Other Court Cases*

#### 1. Detainee Extradition over Wang Kelian Mass Graves and Transit Camps

Four Thai nationals - Arun Kaeofainok, Jepha Lapi-E, Somphon A-dam and Amree Nesalaeh – were extradited to Malaysia in 2023 in connection with the 139 mass graves and 29 immigrant detention camps discovered along the Malaysia-Thailand border in

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14 Hidir Reduan Abdul Rashid, '1MDB detention suit: Govt, Khairuddin appeal hearing on July 13' (Malaysiakini, 11 January 2023)

<<https://www.malaysiakini.com/news/651150>> accessed 10 November 2023

15 'Appeals Court to hear govt's appeal in Khairuddin's lawsuit on March 6' (The Star, 28 November 2023)

<<https://www.thestar.com.my/news/nation/2023/11/28/appeals-court-to-hear-govts-appeal-in-khairuddins-lawsuit-on-march-6>> accessed 1 March 2024

16 Section 124C concerns the attempt to commit activities detrimental to parliamentary democracy: "Whoever attempts to commit an activity detrimental to parliamentary democracy or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years."

17 Section 124L concerns attempt to commit sabotage: "Whoever attempts to commit sabotage or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years."

18 Ho Kit Yen, '1MDB critic awarded RM300,000 damages for wrongful detention under Sosma' (Free Malaysia Today, 24 August 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/08/24/court-awards-rm300000-to-khairuddin-for-wrongful-detention-in-sosma-suit/>> accessed 10 November 2023

19 'Appeals Court upholds five-year jail term for 'Ayahanda Yie Tiger 99' gang members' (The Star, 14 February 2023)

<<https://www.thestar.com.my/news/nation/2023/02/14/appeals-court-upholds-five-year-jail-term-for-039ayahanda-yie-tiger-99039-gang-members>> accessed 10 November 2023

20 Suzalina Halid, 'Penjawat awam ketua Ayahanda Yie Tiger 99 kena tuduh' (Berita Harian, 18 February 2020)

<<https://www.bharian.com.my/berita/kes/2020/02/656660/penjawat-awam-ketua-ayahanda-yie-tiger-99-kena-tuduh>> accessed 10 November 2023

Wang Kelian eight years ago<sup>21</sup>. All were charged at the Kangar Sessions Court in Perlis for smuggling of migrants under Section 26A of ATIPSOM 2007. The case was non-bailable under Section 13 of SOSMA. Malaysia's request for extradition of Thai suspects dated four years ago in 2017. It is also reported that another Thai national, Suchat Tohdin, was arrested and charged for human trafficking in the Wang Kelian case in Johor in 2022, and that the court hearing is still ongoing.

## 2. Two Immigration Officers Charged with Human Trafficking Freed on Bail

Shamsudin Ishak and Junaina Taat were freed on bail by the High Court pending trial outcome<sup>22</sup>. Human trafficking charges faced by both officers were deemed to not be security offences, hence a bail of RM15,000 in one surety was allowed for each of them. Shamsudin was charged with preparing a fraudulent visa under the Malaysia My Second Home programme for a Vanuatuan national, whilst Junaina was charged for abetting Shamsudin. Prior to the High Court proceedings, both were arrested in September 2022 and charged in the sessions court in October 2022. Both were detained under SOSMA.

### *History Repeats Itself: The Sungai Buloh Prison Hunger Strike and Call for SOSMA Amendments/Repeal*

Amendments or repeal of SOSMA remain dire, and this is especially evident in the hunger strike by family members of SOSMA detainees from 31 July to 2 August 2023. 100 family members of 69 SOSMA detainees gathered outside Sungai Buloh Prison to call on the authorities to provide closure on the detention of their loved ones and to abolish SOSMA. It is noteworthy that 20 children, with the youngest being 3 years old, were among the 100 protesters outside the prison entrance. This strike came after a hunger strike by the 69 SOSMA detainees within Sungai Buloh Prison on 30 July 2023. The detainees have been in detention awaiting trial for a period ranging from one to three years. The prison strike ended at 2pm on 2 August 2023. It was only five years ago in 2018 that strikes by detainees<sup>23</sup> and family members<sup>24</sup> took place within and outside the same prison. Similar responses by the government of the day were also observed in strikes in 2018 and 2023. In response to the strikes, both Deputy Ministers in the Prime Minister's Department in charge of Law (and Institutional Reform) – Mohamed Hanipa Maidin and Ramkarpal

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21 Ili Shazwani Ihsan and Wilawan Watcharasakwej, 'Wang Kelian: Malaysia dakwa warga Thailand dengan pertuduhan penyeludupan manusia' (Benar News, 23 June 2023) <<https://www.benarnews.org/malay/berita/my-th-wangkelian-dakwa-230623-06232023155246.html>> accessed 1 March 2024

22 '2 immigration officers charged with human trafficking freed on bail' (Free Malaysia Today, 5 January 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/01/05/2-immigration-officers-charged-with-human-trafficking-freed-on-bail/>> accessed 1 March 2024

23 Hafidzul Hilmi Mohd Noor, '160 tahanan SOSMA mogok lapar' (Berita Harian, 25 August 2018) <<https://www.bharian.com.my/berita/kes/2018/08/465799/160-tahanan-sosma-mogok-lapar>> accessed 10 November 2023

24 Ho Kit Yen, 'Hundreds protest outside prison as Sosma detainees continue hunger strike' (Free Malaysia Today, 25 August 2018) <<https://www.freemalaysiatoday.com/category/nation/2018/08/25/hundreds-protest-outside-prison-as-sosma-detainees-continue-hunger-strike/>> accessed 10 November 2023

Singh - met family members and detainees to urge them to be patient for reform<sup>25,26</sup>. There was a point of different, nonetheless: instead of hinting that detainees may have their charges amended after consideration by the Attorney-General's Chambers (AGC) as what was done in 2018<sup>27</sup>, the current Deputy Minister in the Prime Minister's Department (Law and Institutional Reform) Ramkarpal Singh informed family members of SOSMA detainees that the government is currently studying proposed amendments, among which included allowing bail for detainees<sup>28</sup>. These amendments were the culmination of a series of 13 engagements undertaken with various stakeholders, including civil society, SOSMA detainees in Penang, Alor Setar, Taiping and Sungai Buloh prisons, and detainees' family members<sup>29</sup>. It is noteworthy that 11 out of 13 engagements were conducted with the Royal Malaysian Police, the Prison Department and the Attorney-General's Chambers<sup>30</sup>. Sections 13 and 30, on bail and detention pending exhaustion of legal process respectively, were among the amendments in consideration by the government<sup>31</sup>.

Until SOSMA amendments are tabled and passed in Parliament, the government's commitments will remain rhetorical. Over the last five years, previous Home Ministers (Muhyiddin Yassin, Hamzah Zainudin) have promised to amend or improve the procedural law, all of which were unfulfilled<sup>32</sup>. The road to reform for SOSMA has been protracted on a longstanding basis. This stagnant progress is characterised by the narrative of the procedural law's relevance or necessity in ensuring public order, national security and even sovereignty, which is continuously propagated by the Home Ministry and law enforcement. By the current Home Minister Saifuddin Nasution alone, this narrative was

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25 Mohamad Fadli, 'Hanipa runding dengan tahanan Sosma henti mogok lapar' (Free Malaysia Today, 26 August 2018)

<<https://www.freemalaysiatoday.com/category/bahasa/2018/08/26/hanipa-runding-dengan-tahanan-sosma-henti-mogok-lapar/>> accessed 10 November 2023

26 Teh Athira Yusof, 'Sosma families urged to be patient, end hunger strike' (The Star, 2 August 2023)

<<https://www.thestar.com.my/news/nation/2023/08/02/sosma-families-urged-to-be-patient-end-hunger-strike>> accessed 10 November 2023

27 'Tuduhan 442 tahanan SOSMA mungkin dipinda' (Berita Harian, 29 August 2018)

<<https://www.bharian.com.my/berita/nasional/2018/08/467502/tuduhan-442-tahanan-sosma-mungkin-dipinda>> accessed 10 November 2023

28 '12 engagement sessions held over proposed Sosma amendments' (The Star, 3 August 2023)

<<https://www.thestar.com.my/news/nation/2023/08/03/12-engagement-sessions-held-over-proposed-sosma-amendments>> accessed 10 November 2023

29 Rahimy Rahim, Gerard Gimino and Teh Athira Yusof, 'Proposed improvements to Sosma to be announced soon, says Ramkarpal'

(The Star, 22 May 2023) <<https://www.thestar.com.my/news/nation/2023/05/22/proposed-improvements-to-sosma-to-be-announced-soon-says-ramkarpal>> accessed 10 November 2023

30 Oral Question in Parliament, Question 41, 23 October 2023

31 Ibid

32 In 2018, the Home Minister claimed that he had instructed the police to develop new standard operating procedures for case management as an interim measure pending amendment or repeal of SOSMA, and that amendments to SOSMA will be tabled in Parliament in the November 2018 or March 2019 Parliament sessions. By 2019, the timeline was pushed back multiple times, ending in a statement by the Home Minister in November 2019 that the Cabinet would be looking into amending SOSMA. In 2020, the government also vaguely promised to consider amending security laws like SOSMA.

recycled less than a month after appointment<sup>33</sup>, subsequently reiterated in replies to parliamentary questions by members of Parliament<sup>34</sup> in 2023. As for law enforcement, the Deputy Inspector-General of Police argued that SOSMA needs to be widely applied to effectively crack down on syndicate-related criminal activities, citing Johor's past successful efforts in curbing human trafficking syndicates whilst he was the state's police chief<sup>35</sup>.

### *The Socioeconomic Lens to the Need for SOSMA Amendments/Repeal*

Interestingly and ironically, the government's commitment to ensure that fundamental rights of individuals are protected is consistently made alongside the touted purposes of continuing use of SOSMA. Socioeconomic challenges continuously experienced by family members of SOSMA, however, blatantly demonstrate the impossibility of striking such a balance, especially when tangible amendments to the procedural law are yet to be tabled, passed, and implemented. SUARAM conducted interviews with former SOSMA detainees as well as family members of former and current SOSMA detainees, as part of the qualitative research study to understand these socioeconomic challenges. The negative cascade effect found is all-encompassing, infringing on civil, economic, and social rights of families of these detainees.

#### **Key Findings from SUARAM's Study**

##### *'The Socioeconomic Impact of SOSMA Detention in Malaysia'*

- As almost all detainees were family breadwinners prior to arrest and detention, loss of income was the most apparent and immediate consequence experienced, which directly jeopardised the family's financial security. Although spouses who were previously homemakers adapted to the situation by working, the family's financial situation was not alleviated due to exorbitant detention-related expenses. These expenses included legal fees for their loved ones, and expenditures incurred when visiting them in detention facilities. Even if the detainees were to be acquitted, no significant improvement in socioeconomic status was observed, due to persisting difficulties in securing employment and accessing basic financial services such as bank accounts.
- Detention under SOSMA was found to have a serious impact on the detainees' children, specifically their wellbeing and education. The children's longing for their detained parents led to behavioural changes, including sleep problems and long-term emotional distress. Decline in emotional and mental wellbeing affected access to education, seen in effects such as difficulties in learning and school

33 Mohamed Basyir, 'Saifuddin: Sosma necessary to manage organised crimes' (New Straits Times, 14 December 2022)

<<https://www.nst.com.my/news/nation/2022/12/860867/saifuddin-sosma-necessary-manage-organised-crimes>> accessed 10 November 2023

34 Questions by Members of Parliament for the constituencies of Bandar Kuching, Damansara, Jelutong, Klang and Selayang

35 'Sosma must be better used to cripple crime rings, says Ayob Khan' (The Star, 27 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/27/sosma-must-be-better-used-to-cripple-crime-rings-says-ayob-khan>> accessed 10 November 2023

absenteeism. Bullying by peers due to the detention status of their parents was also a contributing factor to school absenteeism by children of SOSMA detainees.

- SOSMA detention was also found to uproot the social lives of these families. One aspect consists of violations of security and privacy of these families were documented via unconsented dissemination of their personal information to the public. With societal stigma against SOSMA detainees still prevalent, such violations make families of SOSMA detainees more vulnerable to negative treatment and even discrimination by authorities and members of the public. Some families had to move to different cities or even states, due to community stigma. The other is deterioration in relationship quality especially between the detainees and their spouses. In cases where such deterioration was irreversible, divorce was the end result.

The above socioeconomic effects are compounded by the indefinite and protracted waiting time spent by detainees for trial.

### **Prevention of Crime Act 1959**

POCA is introduced to prevent organised crime, especially those relating to triads, secret societies and repeat offenders. It is much more similar to the repealed Internal Security Act 1960 and circumvents the criminal justice system by denying detainees any opportunity to defend themselves in court. The Act was amended in 2014 and 2017 respectively with additional provisions, making the law even more draconian.

Under POCA, any individual arrested can be detained for a maximum of 60 days with a breakdown of remand hearing after the initial 24 hours, after 21 days and for a further extension of 28 days. After the initial remand period, individuals would be sentenced to either a two-year detention order or two-year house arrest. The detention order can be renewed once every two years, if the Crime Prevention Board thinks it necessary for the person to remain incarcerated.

Despite the existence of a 'hearing' process by the Prevention of Crime Board to determine the detention order, the process of detention under POCA has been widely criticised, as it contradicts international standards on right to fair trial. Serious concerns are directed towards the standard of evidence required for a detention order; criteria establishing the necessity of incarceration and use of electronic monitoring; as well as vulnerability to torture and ill-treatment by enforcement officers during detention.

House arrest under POCA is often referred to as 'banishment' (*buang daerah*), as they are often sentenced to locations away from their homes in other states within Malaysia. Individuals on house arrest are required to wear Electronic Monitoring Devices. Their movements are curtailed to a 5km radius, subjected to regular checks by police officers. They would also have to report to a designated police station on a periodic basis.

There are no media reported POCA arrests/detention cases in 2023.

### SUARAM-Documented POCA Arrests/Detention Over Five Years

Year	Terrorism	Trafficking/Immigration	Organised Crime	Unidentified	Total
2019	0	0	908	0	908
2020	0	7	116	544	667
2021	0	3	239	3	245
2022	0	0	133	0	133
2023	0	0	0	0	0

Nevertheless, similar to observations made in the 2021 Malaysia Human Rights Report, POCA continues to be actively used against individuals involved in illegal organised activities such as online gambling and illegal public lotteries. In Home Minister Saifuddin Nasution's reply to Betong member of Parliament Dr. Richard Rapu's parliamentary question, for instance, a total of 2081 raids were conducted on the aforementioned organised activities in Sarawak. This led to the arrest of 2153 individuals, with action taken under POCA and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act (AMLATFPUAA) 2001, aside from the Common Gaming Houses Act 1953 and the Betting Act 1953<sup>36</sup>.

As noted in the 2021 Malaysia Human Rights Report, the Court of Appeal made a landmark decision to declare that Sections 4 and 15(B) of POCA are unconstitutional, as they run afoul of Articles 4 and 121 of the Federal Constitution. Both sections curtail effective judicial review against detentions under POCA. In the same appeal, Section 15(B) of the ouster clause was also concluded to be void. Under Section 15(B), judicial review of grounds of detention or elements of abuse that took place is prohibited and is only confined to scrutinising detention procedures (e.g., whether a form has been produced by the court and signed by the detainee). Thus, this ouster clause unjustifiably reduces the purpose of judicial review as a check-and-balance mechanism against the executive to a mere clerical function.

Nevertheless, the said Federal Court decision cannot be retrospectively applied to prior cases of POCA detention. This is demonstrated in an unexpected turn in developments in social activist R. Sri Sanjeevan's case. On 15 September 2023, the Court of Appeal allowed the appeal by the police and government to overturn the 2022 High Court ruling that Sanjeevan's 16-day detention in 2016 under Section 4 of POCA was unlawful<sup>37</sup>. The apex court judges ruled that such a retrospective application would open the floodgates for any and all remands under Section 4 to be unconstitutional, when these procedures were carried out in reliance of the fact that said Section was lawful at the time. Sanjeevan was ordered to pay RM60,000 in costs. In addition, the 2022 High Court finding that the physical abuse allegation could be used in claiming false imprisonment was also overturned, on grounds of Sanjeevan's documented awareness of the actuation of arrest

<sup>36</sup> Oral Question in Parliament, Question 70, 12 March 2024

<sup>37</sup> 'Former MyWatch chairman's detention was lawful, Appeals Court rules' (The Star, 15 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/15/former-mywatch-chairman039s-detention-was-lawful-appeals-court-rules>>  
accessed 10 November 2023

and remand under Section 4 of POCA. The apex court also cited the lack of opportunity given to appellants to challenge this contention, as this issue was only raised during the appeal hearing and not prior in Sanjeevan’s written submission.

### Prevention of Terrorism Act 2015

Both in form and function, POTA is largely like POCA. One key difference is the purpose of the legislation. While POCA is allegedly meant to address threats posed by organised crimes, POTA was specifically introduced to address terrorist threats. Another distinction is the scope of terrorism to which the law applies. Whilst POCA and SOSMA are usually used in cases of local terrorism, POTA is primarily applied in cross-border terrorism. In terms of powers, POTA is largely similar, if not identical, to POCA, with its power to detain an individual for 24 hours with subsequent extensions of 21 and 38 days. If found ‘guilty’ by the Prevention of Terrorism Board, an individual can be served with a two-year detention order or placed under house arrest.

To date, no information about detention under POTA and conditions through which detainees undergo in 2023 is available in the media.

#### SUARAM-Documented POTA Arrests/Detention Over Five Years

Year	Terrorism	Trafficking/Immigration	Organised Crime	Unidentified	Total
2019	1	0	0	0	1
2020	1	0	0	0	0
2021	0	0	0	0	0
2022	0	0	0	0	0
2023	0	0	0	0	0

Members in the current government administration seemed to demonstrate receptivity to review and improve terrorism-related laws. Replying to a supplementary question from Padang Terap MP on the government’s intention to do so, the Deputy Foreign Affairs Minister Mohamad Alamin stated that his ministry stands ready to assist related ministry that intend to amend POTA and the Special Measures Against Terrorism in Foreign Countries Act 2015<sup>38</sup>.

### Dangerous Drugs (Special Preventive Measures) Act 1985

DD(SPM)A is similar to the repealed Internal Security Act 1960. While the sentencing power under POCA and POTA is afforded to a ‘prevention board’. DD(SPM)A retains the old policy whereby detention orders are meted out by the Home Minister. While this law denies the individual the right to fair trial, detention under DD(SPM)A is often seen as a ‘reprieve’ from the death penalty under Section 39B of the Dangerous Drugs Act 1952 (DDA52).

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38 Nor Ain Mohamed Radhi and Luqman Hakim, ‘Foreign affairs ministry ready to assist with improving anti-terrorism laws [NSTTV]’ (New Straits Times, 18 October 2023) <<https://www.nst.com.my/news/nation/2023/10/968446/foreign-affairs-ministry-ready-assist-improving-anti-terrorism-laws-nsttv>> accessed 10 November 2023

According to the Bukit Aman Narcotic Crime Investigation Department (NCID), a total of 1012 individuals<sup>39</sup> were detained under Section 3(1) of DD(SPM)A. This number is lower than post-2016 figures disclosed by the government in Parliament and the police.

Year	Arrests
2013	869
2014	948
2015	854
2016	1015
2017	1237
2018	1186
2019	1405
2020	--
2021	1186
2022	1261
2023	1012

*\*Number of arrests for 2021 and 2022 are obtained via a media statement by the Inspector-General of Police<sup>40</sup>. Figures prior to 2021 are sourced from government's replies to parliamentary questions.*

For breakdown by state, police from five states disclosed figures spanning across at least eight months, with Penang, Pahang and Johor covering the number of arrests throughout 2023. The Johor police further revealed that out of 127 individuals arrested, 124 of them (97.63%) were given detention or restriction orders<sup>41</sup>.

Narcotics Crime Investigation Branch	Reporting Period for 2023	No. of Individuals Arrested/Detained under DD(SPM)A
Penang	Jan- Dec	114
Pahang	Jan - Dec	78
Johor	Jan - Dec	127
Kedah	Jan - Sep	59
Sabah	Jan - Aug	29

## Recommendations

Reflecting on the progress, gaps and developments raised in the chapter, SUARAM calls for:

- Table as soon as possible by 2024 amendments to SOSMA, which should especially include Section 13 (pertaining to the right to bail) and Section 4(5) (the sunset clause

<sup>39</sup> Farik Zolkepli, 'Over RM700mil worth of drugs seized last year' (The Star, 31 January 2024)

<<https://www.thestar.com.my/news/nation/2024/01/31/over-rm700mil-worth-of-drugs-seized-last-year>> accessed 1 March 2024

<sup>40</sup> Farik Zolkepli, 'Nation's crime index down' (The Star, 12 January 2023)

<<https://www.thestar.com.my/news/nation/2023/01/12/nations-crime-index-down>> accessed 1 March 2024

<sup>41</sup> 'Johor seized five tonnes of drugs' (The Star, 4 January 2024) <<https://www.thestar.com.my/news/nation/2024/01/04/johor-seized-five-tonnes-of-drugs>> accessed 1 March 2024

of 28-day detention that needs to be renewed by Parliament every five years). Until these amendments are passed in Parliament and enforced, a moratorium on the enforcement of current provisions should be imposed;

- Expedite hearing dates and prioritise court dates for SOSMA cases;
- Provide responsive psychosocial support with regular follow-up to released SOSMA detainees to facilitate reintegration into society, including securing jobs. Support such as financial assistance should be provided to families (especially women and children) of detainees.
- Conduct stakeholder engagements with civil society to amend POCA.



RIGHT TO JUSTICE

# RIGHT TO JUSTICE

SUARAM

## Independent Police Conduct Commission

Whilst the Independent Police Conduct Commission (IPCC) Act was passed in Parliament in July 2022, it is limited, in its current form, in its ability to provide independent and fully accountable oversight over police conduct, as well as to act as a safeguard in access to justice. No efforts, nor commitments, have been made to improve the legislation. It is noteworthy that whilst in Opposition, the Pakatan Harapan coalition rejected the bill in July last year when it was passed for the same reasons as advocated by civil society<sup>42</sup>, and even included within its manifesto the pledge to strengthen IPCC in line with recommendations from the 2005 Royal Commission Report on Malaysian Police<sup>43</sup>.

SUARAM maintains the view that the previous Independent Police Complaints and Conduct Commission (IPCCM) Bill guarantees police accountability. Firstly, unlike the IPCC which is limited to providing recommendations to the Police Force Commission without powers to compel replies or action, the Bill provides enforcement powers to IPCCM to reprimand and punish errant police officers. Secondly, the IPCCM is granted effective investigative powers such as conducting unannounced visits to police premises and can take necessary measures to collect evidence for investigations. IPCC's investigative powers, on the other hand, are gagged by provisions that give police rights to refuse answering questions that may expose other police officers to possible criminal penalty, and submitting documents that they deem to be prejudicial to national security or interest<sup>44</sup>. Thirdly, unlike the IPCC Act, the IPCCM Bill prohibits the appointment of former police officers or current government officials to the Commission, which ensures institutional independence in carrying out its mandate.

The IPCC Act was enforced on 1 July 2023, but this was not accompanied with swift establishment of IPCC.

- By 12 October 2023, selection, evaluation and appointment of members for the Commission was still ongoing<sup>45</sup>. The Home Ministry agreed in April to set up a search committee to suggest candidates<sup>46</sup>. This committee would be chaired by the Head

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42 'Opposition rejects 'weaker' IPCC Bill, says doesn't meet expected reforms' (Free Malaysia Today, 27 July 2022)

<<https://www.freemalaysiatoday.com/category/nation/2022/07/27/opposition-rejects-weaker-ipcc-bill-says-doesnt-meet-expected-reforms/>> accessed 10 November 2023

43 Pakatan Harapan, 'Keselamatan Negara' <<https://kitaboleh.my/tawaran-kita-boleh/keselamatan-negara/>> accessed 10 November 2023

44 Section 27(4)(a) and (b) of the Independent Police Conduct Commission Act 2022

45 Mazwin Nik Anis, 'IPCC to get its members soon, says Home Minister' (The Star, 12 October 2023)

<<https://www.thestar.com.my/news/nation/2023/10/12/ipcc-to-get-its-members-soon-says-home-minister>> accessed 10 November 2023

46 Oral Question in Parliament, Question 35, 20 November 2023

Secretary of the Ministry, consisting of six committee members from the Home Ministry, the Attorney-General's Chambers (AGC), Royal Malaysian Police (RMP) and Malaysian Anti-Corruption Commission (MACC). The selection criteria and process used for Commission member appointments are not made public.

- There is currently no operational oversight mechanism to handle complaints against the RMP or its officers, as the Enforcement Agency Integrity Commission (EAIC) has ceased accepting related complaints as of 1 July<sup>47</sup>, and the IPCC is only expected to be fully operational by early 2024 at the earliest<sup>48</sup>. 94 complaints have been received under Section 5(2) of the IPCC Act<sup>49</sup> - nevertheless, no explicit timeline to set up relevant standard operating procedures to investigate and resolve these complaints was given.

### Deaths in Custody

Based on case statistics disclosed by the government through a parliamentary reply in February 2023, cases of deaths of detainees in police lockups in 2022 (i.e., 24 cases) have reduced by 47.8% compared to 2021 (i.e., 46 cases). Case numbers over the last 10 years were also commendably revised by the government to encompass deaths within and outside of police lockups. This revision, though long overdue, is greatly needed, as deaths outside of police lockups constituted 93.9% of disclosed cases from 2012 to 2022 (108 out of 115 cases). Out of these 108 deaths, close to 90% of them took place within hospitals (78 cases; 72.2%) or en route from police lockups to hospitals (16 cases; 14.8%). Prison DIC prevalence was consistent (i.e., 9 cases each in 2021 and 2022), whilst immigration DIC spiked by a whopping 427.6% from 29 cases in 2021 to 153 cases in 2022.

Nevertheless, the extent to which disclosed death-in-custody (DIC) case statistics reflects actual DIC prevalence remains a question. A longstanding contributing factor is data inconsistency. Comparing case figures compiled over successive years through parliamentary questions and the 10-year data disclosed in a parliamentary question in October 2023, total case numbers for police and prison DIC reduced by 37.5% and a staggering 92.8% respectively. Immigration DIC, on the other hand, saw a difference of 13.5% between two sets of case statistics. For particularly prison DIC, not only were there inconsistent availability of data for the first three years within the 10-year period, but also were significant discrepancies in case numbers from years 2015 to 2017 observed.

Lacklustre data transparency is also a recurring issue, and this is demonstrated in case numbers for immigration DIC, via the absence of breakdown of deaths within and outside immigration depots.

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<sup>47</sup> 'EAIC will no longer accept complaints against PDRM, officers starting July 1' (The Star, 30 June 2023)

<<https://www.thestar.com.my/news/nation/2023/06/30/eaic-will-no-longer-accept-complaints-against-pdrm-officers-starting-july-1>> accessed 10 November 2023

<sup>48</sup> 'IPCC to be fully operational early 2024' (Malaysiakini, 17 November 2023) <<https://www.malaysiakini.com/news/686858>> accessed 20 November 2023

<sup>49</sup> Ibid

### DIC Case Statistics Compiled Over the Years<sup>50</sup>

	Police	Prison	Immigration	Total
2012	19	-	-	19
2013	13	-	-	13
2014	18	-	44	62
2015	12	252	87	351
2016	15	269	40	324
2017	10	319	24	353
2018	8	2	32	42
2019	6	3	55	64
2020	13	13	37	63
2021	46*	9	29	84
2022	24*	9	153	186
	<b>184</b>	<b>876</b>	<b>501</b>	<b>1561</b>

\*Figures consist of deaths within and outside of police lockups

### Government's DIC Statistics<sup>51</sup>

	Police	Prison	Immigration	Total
2012	3	1	569	
2013	2	1		
2014	2	1		
2015	5	6		
2016	10	4		
2017	10	9		
2018	8	8		
2019	14	5		
2020	16	13		
2021	32	12		
2022	13	3		
2023 (Jan – 17 May)				
	<b>115</b>	<b>63</b>		<b>747</b>

Among 14 media reported DIC cases in 2023, 12 of them took place in police custody. All except two deceased detainees under police custody were detained or charged under the Dangerous Drugs Act 1952. Health reasons was the predominant cause of death (11 cases), with 54.5% of related cases involving deaths in less than 24 hours after symptom manifestation. While information shared by authorities included reasons for detaining the victims and flow of events leading up to their deaths, no updates in case investigations were provided beyond mentions of conducting or having conducted post-mortem examinations and where applicable, the Criminal Investigation Unit on Deaths in Custody

<sup>50</sup> Sources consist of parliamentary questions from previous years, and in the case of statistics for the year of 2022, the information was obtained from Oral Answer in Parliament, Question 37, 28 February 2023

<sup>51</sup> Oral Question in Parliament, Question 137, October 2023

(USJKT) continuing investigations ‘from various angles before submitting results of the investigation to the coroner’<sup>52</sup>. This half-baked transparency was also seen in USJKT’s press statements notifying the public of occurring DIC cases, released within the first 9 months of 2022.

Greprall Sall’s case was significant, in light of negligence by prison authorities in the body identification process. Greprall was arrested by the police on 24 February 2023 for an unspecified offence. He passed away on 2 March 2023 in Sungai Buloh Prison. Whilst pneumonia was established as the official cause of death, Greprall’s brothers asserted that he was fine and only complained that one of his ears hurt when they met in court. Greprall’s body was mishandled to his inmate C. Laksman’s family in Negeri Sembilan, who had intended to cremate him on 5 March. The mix-up only came to light on the day of the cremation, with the ceremony stopped less than five hours before it was carried out. The Home Minister Saifuddin Nasution personally reimbursed the cremation expenses to Laksman’s family by 9 March 2023. Whilst Saifuddin also acknowledged the presence of elements of negligence and clarified that he had instructed a committee to be formed to investigate this incident, there were no updates on investigation findings and action taken against relevant prison officers.

#### Media Reported DIC Cases in 2023

No	Name <i>Nationality, Age, Gender</i>	Date of Death	Detention Location <i>(Custody Authorities)</i>	(Alleged) Cause of Death
1	Unnamed <i>Malaysian, 47, Male</i>	11 January 2023	Larkin clinic ( <i>Police</i> )	Health reasons
2	Unnamed <i>Unreported, 35, Male</i>	19 January 2023	Baling Lockup <i>(Police)</i>	Health reasons
3	Unnamed <i>Non-Malaysian, 49, Male</i>	23 January 2023	Sultanah Aminah Hospital ( <i>Police</i> )	Health reasons
4	Greprall Sall <i>Malaysian, 18, Male</i>	3 February 2023	Sungai Buloh Prison <i>(Prison)</i>	Health reasons
5	Unnamed <i>Malaysian, 60s, Male</i>	15 June 2023	Putrajaya Hospital <i>(Malaysian Anti- Corruption Commission (MACC))</i>	Health reasons
6	Unnamed <i>Malaysian, 40, Male</i>	7 July 2023	Seberang Perai Selatan District Police Headquarters <i>(Police)</i>	Suicide

<sup>52</sup> ‘Bukit Aman: No criminal injuries found on man who died in custody at Sungai Besar police station’ (Malay Mail, 28 October 2023) <<https://www.malaymail.com/news/malaysia/2023/10/28/bukit-aman-no-criminal-injuries-found-on-man-who-died-in-custody-at-sungai-besar-police-station/98838>> accessed 10 November 2023

7	Unnamed <i>Malaysian, 59, Male</i>	25 July 2023	Setiawangsa Lockup <i>(Police)</i>	Health reasons
8	Unnamed <i>Non-Malaysian, 50, Male</i>	31 July 2023	En route from Marudi District Police Headquarters to Beluru Clinic <i>(Police)</i>	Health reasons
9	Unnamed <i>Unreported, 51, Male</i>	8 August 2023	Kubang Pasu District Police Headquarters <i>(Police)</i>	Suicide
10	Unnamed <i>Malaysian, 39, Male</i>	8 September 2023	Kuala Muda District Police Headquarters <i>(Police)</i>	Health reasons
11	Unnamed <i>Non-Malaysian, 43, Male</i>	30 September 2023	Jinjang Centralised Lockup <i>(Police)</i>	Health reasons
12	Mohd Nahar Kamsah <i>Malaysian, 49, Male</i>	27 October 2023	Sungai Besar Police Station <i>(Police)</i>	Unknown
13	Unnamed <i>Malaysian, 38, Male</i>	23 November 2023	Pengkalan Chepa Police Lockup <i>(Police)</i>	Health reasons
14	Unnamed <i>Malaysian, 34, Female</i>	16 December 2023	Kuah Police Lockup <i>(Police)</i>	Health reasons

For families of the deceased in DIC cases, getting an inquest granted is a persistent challenge. This is clearly reflected in the proportion of inquests conducted – depending on the dataset quoted, inquests were only done in 15.1%<sup>53</sup> of 31.5%<sup>54</sup> of all DIC cases over the last 10 years.

Inquest findings disclosed by the government also stopped short at the apparent cause of death. For non-tuberculosis bacterial infection cases which has a broad aetiology and currently constitutes the largest category of DIC inquest findings, providing further information about the manner of death including the presence of unlawful acts or their omission that caused/contributed/accelerated to this condition would be crucial for families in their pursuit of justice for their loved ones. Although the two-pronged purpose of the inquest is clearly stipulated within the Criminal Procedure Code (CPC)<sup>55</sup>, inquests, when conducted, usually stop short upon determining the cause of death, with no further attempts made to fulfil the second prong. In addition, relevant provisions in the CPC are

53 Out of 1561 DIC cases, extracted by SUARAM from previous years' parliamentary questions

54 Out of 747 DIC cases, quoted from Oral Question in Parliament, Question 137, October 2023

55 Section 328 of the Criminal Procedure Code on the definition of cause of death: "...not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by, any unlawful act or omission on the part of any other person".

insufficient in clearly and comprehensively outlining the roles and duties of the Coroner in inquiries, as well as the two-pronged purpose of these procedures. Amendments to the CPC are necessary to safeguard the rights of the deceased, as well as the interest of their family members and legal representatives as they seek justice. A Coroners' Court Act, a solution also long propounded by the Bar Council, may be necessary in empowering Coroners to carry out their mandate of conducting inquiries of deaths, including DIC cases, effectively and independently.

#### **Government Statistics on Number of Inquests Conducted Over the Last 10 Years<sup>56</sup>**

2012	1
2013	1
2014	19
2015	27
2016	21
2017	14
2018	3
2019	19
2020	31
2021	20
2022	79
<b>Total</b>	<b>235</b>

SUARAM is currently assisting family members of Roopan a/l Karnagaran with their inquest. Roopan was detained over involvement in triple murder in his neighbour's home in 2013, when he was only 17 years old<sup>57</sup>. After being convicted of murder in 2017 when he turned 21, Roopan appealed against it and was serving time in prison pending the appeal date of 29 June 2021. On 17 June 2021, he was admitted to Kajang Hospital due to breathing difficulties, and subsequently discharged. Four days later, Roopan died. The inquest was held in February and May 2023<sup>58</sup>, hearing 25 witnesses including inmates, then on-duty medical professionals in the prison clinic and hospital visited by Roopan, and investigating officer who took up Roopan's case after police reports on the prison's negligence were lodged by the family. The date for the Coroner to deliver the verdict was initially set for 25 August, but it has been postponed till further notice in 2024.

SUARAM noted two past DIC cases, in which final court proceedings took place in 2023. Both cases, after a gruelling five to six years, led to justice for the deceased's family.

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<sup>56</sup> Oral Answer in Parliament, Question 138, October 2023

<sup>57</sup> Ainaa Aiman, '25-year-old dies in custody, 12th custodial death of the year' (Free Malaysia Today, 9 July 2021)

<<https://www.freemalaysiatoday.com/category/nation/2021/07/09/25-year-old-dies-in-custody-12th-custodial-death-of-the-year/>> accessed 10 November 2023

<sup>58</sup> Faisal Asyraf, 'Roopan's inquest ends, doctor who ordered blood test still unknown' (Free Malaysia Today, 18 May 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/05/18/roopans-inquest-ends-doctor-who-ordered-blood-test-still-unknown/>> accessed 10 November 2023

<p>M Segan (death: 9 April 2017; 46 years old)</p>	<p>Segan was arrested and remanded on 7 April 2017 over alleged drug abuse. On 9 April, Segan was found shivering in his cell at 1.20am and was given an analgesic. A doctor was called in after his condition worsened. Segan died 10 minutes before the doctor's arrival<sup>59</sup>. Post-mortem results found the cause of death to be injuries to internal tissues from blunt force trauma, with the age of the injuries coinciding with the time of arrest and detention.</p> <p>The Coroner's Court ruled Segan's death to be misadventure. After appeal by the family to the decision, the Negeri Sembilan High Court declared an open verdict.</p> <p>On 9 September 2023, the High Court found that the police and the government had been negligent in ensuring Segan's safety whilst in custody<sup>60</sup>. The respondents were ordered to pay close to RM450,000 in damages to Segan's spouse and son.</p>
<p>S Thanabalan Subramaniam (death: 17 April 2018; 30 years old)</p>	<p>Thanabalan was arrested and detained under SOSMA on 29 March 2018 for alleged involvement in a secret society<sup>61</sup>. He was found unconscious at the Shah Alam Central Lockup at 8.20pm on 17 April 2018, and was pronounced dead less than an hour later. It was then suspected that he may have died from a viral outbreak, as he had fever, stomachache, diarrhoea and loss of appetite for four days prior to his death, and ten other detainees complained of similar symptoms<sup>62</sup>.</p> <p>In December 2020, the Coroner found that Thanabalan's existing non-fatal heart condition, myocardial bridging, deteriorated as a result of leptospirosis, which was caused by exposure to food or water contaminated by leptospira bacteria found in rat urine. In 2021, Thanabalan's spouse, V Santhi, filed a suit against the police and government for negligence over his death. A year later, the Shah Alam High Court dismissed the suit, to which the family responded by filing an appeal. On 30 October 2023, the Court of Appeal found that the defendants were negligent for failing to send Thanabalan to the hospital as soon as possible – a delay by 2.5 hours that</p>

59 Sarban Singh, 'Widow, son get close to RM450,000 in custodial death civil suit' (The Star, 8 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/08/widow-son-get-close-to-rm450000-in-custodial-death-civil-suit>> accessed 20 November 2023

60 Ibid

61 'Suspected underworld gang member dies in police custody' (The Sun Daily, 19 April 2018) <<https://thesun.my/archive/suspected-underworld-gang-member-dies-police-custody-updated-AUARCH541106>> accessed 20 November 2023

62 Farik Zolkepli, 'Cause of Thanabalan's death not known yet, say cops' (The Star, 20 April 2018)

<<https://www.thestar.com.my/news/nation/2018/04/20/cause-of-thanabalan-s-death-in-lock-up-no-known-yet-say-cops>> accessed 20 November 2023

	<p>was unjustifiable, when the hospital was just five minutes away<sup>63</sup>. The deceased's cell was also found to be contaminated with the leptospira bacteria due to the lockup's deplorable conditions and lack of access to clean water. Aggravated damages were awarded to Thanabalan's spouse and father, alongside RM50,000 in costs for court proceedings<sup>64</sup>.</p>
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Various measures were implemented by detention authorities to different extents to prevent DIC. The police and the Prison Department have been more active in their efforts. In reply to a parliamentary question in February 2023, the Ministry of Home Affairs mentioned that there are ongoing initiatives within the police force, such as preparation of standard operating procedures on lockup management and in-progress installation of CCTVs at 684 lockups<sup>65</sup>. Lockup inspection by officers in charge of police districts are undertaken at least four times daily to prevent misconduct and DIC<sup>66</sup>. Preparation of amendments to the Lockup Rules 1953 was also reportedly in the works<sup>67</sup>. As for the Prison Department, education initiatives were undertaken, such as the translation of Nelson Mandela Rules and relevant e-modules were translated into Bahasa Melayu, and the development of the 'Human Rights and Detention' training manual in collaboration with the National Human Rights Commission of Malaysia (SUHAKAM)<sup>68</sup>. No systematic measures by the Immigration Department to prevent DIC are reported.

Nevertheless, crucial but longstanding gaps remain, some of which were identified by the Parliamentary Special Select Committee on Human Rights, Elections and Institutional Reform in their report on prison conditions in Malaysia<sup>69</sup>:

- Poor prison conditions. This is especially the case for pre-war prisons, of which infrastructure is beyond repair and access to basic needs such as sanitation facilities and clean water that are essential to right to health is hindered. Inadequate budget allocation for basic needs is also cited.
- Overcrowding. Detainees on remand significantly contribute to this phenomenon. In Seberang Perai prison, for example, the proportion is 60%. It is noteworthy that among 99,000 detainees in 2021 across the country, around 10% of them were SOSMA, POCA and POTA detainees, which is relatively high. Other factors that compound overcrowding include detention of first-time drug users as well as delays in

63 V Anbalagan, 'Police liable for death of detainee in lockup, court rules' (Free Malaysia Today, <<https://www.freemalaysiatoday.com/category/nation/2023/10/30/police-liable-for-death-of-detailee-in-lockup-court-rules/>> accessed 20 November 2023

64 Ibid

65 Oral Answer in Parliament, Question 37, 28 February 2023

66 Aliza Shah and Shahrin Aizat Noorshahrizam, 'Exclusive: IGP on a mission to fortify police's core principle of integrity [NSTTV]' (New Straits Times, 8 October 2023) <<https://www.nst.com.my/news/nation/2023/10/964452/exclusive-igp-mission-fortify-polices-core-principle-integrity-nsttv>> accessed 10 November 2023

67 Oral Answer in Parliament, Question 37, 28 February 2023

68 Derived from updates provided by representatives from the Ministry of Foreign Affairs or Permanent Missions of Malaysia in external dialogues.

69 The report is accessible here: <https://www.parlimen.gov.my/ipms/eps/2023-11-28/DR.16.2023%20-%20DR16.2023.pdf>

investigation and court procedures. Current initiatives undertaken by the Prison Department to reduce overcrowding include rehabilitation and reintegration programmes for detainees, as well as amendments to the Prisons Act 1995 and the Drug Dependents (Treatment and Rehabilitation) Act 1983.

- Inadequate health equipment, such as lab tests, X-ray facilities and new vehicles to transport detainees. Inadequate personnel are also cited, for wardens due to unsatisfactory work conditions and also healthcare professionals.

### **Torture and Ill-Treatment in Custody**

Torture has been and remains a well-documented and recurring issue in Malaysia. Incidents of physical remand inflicted upon detainees under remand or during investigations are prevalent, especially when there is chain remand or detention under security laws. It is generally difficult to provide the appropriate medical evidence to ascertain that torture has been inflicted, as detainees are often locked away until their court appearances and are subjected to threats of further violence by investigating officers should they reveal what had been inflicted upon them.

A case of alleged torture that surfaced in 2023 was that of 125 inmates in a prison in the northern Peninsular<sup>70</sup>. They were allegedly abused for talking and perceived disobedience during muster sessions, reportedly beaten with PVC pipes and other blunt objects by wardens. They were also allegedly subjected to frequent 'cavity' searches after returning from court dates in a degrading manner, being told to lay on the ground unclothed. Water for drinking, sanitation and ablution was reportedly scarce, and other basic rights including access to adequate food and health services were denied. The inmates detailed their experiences in a petition whilst in detention and submitted it to the government through their lawyer. This is the second time that such a petition was initiated, following claims of similar abuses at another prison in the same state<sup>71</sup>. To date, neither the Prisons Department nor Saifuddin has responded to the alleged torture and ill-treatment incidents raised.

In October 2023, an eight-second video of a suspect tortured by narcotics police at South Klang police headquarters went viral on social media<sup>72</sup>. One officer was seen stepping on the suspect's knee. The other officer in the video whipped the suspect's foot with what appeared to be a cane or rubber hose – the *falanga* method, which is recognised as a form of torture by the European Court of Human Rights. Preliminary investigations revealed

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70 Predeep Nambiar, '125 inmates file petition to govt alleging abuse by wardens' (Free Malaysia Today, 5 July 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/07/05/125-inmates-file-petition-to-govt-alleging-abuse-by-wardens/>>  
accessed 10 November 2023

71 M. Fakhru Halim, 'Prison inmates pepper-sprayed on their privates during quarantine' (Malaysiakini, 1 May 2021)

<<https://www.malaysiakini.com/news/572991>> accessed 10 November 2023

72 'Shocking video of alleged police brutality in Klang Selatan emerges [NSTTV]' (New Straits Times, 11 October 2023)

<<https://www.nst.com.my/news/nation/2023/10/965918/shocking-video-alleged-police-brutality-klang-selatan-emerges-nsttv>>  
accessed 10 November 2023

that the incident took place on 2 August 2022<sup>73</sup>. Investigations were said to be conducted on the two police personnel, and that findings will be sent to the Attorney-General's Chambers for recommendations<sup>74</sup>. No subsequent updates were provided on investigation findings and action taken against them.

Access to justice for families in cases of alleged torture and ill treatment is also protracted. Court trials monitored by SUARAM as below entail DIC cases due to torture and ill treatment that occurred as far back as 2013.

<p>P Karuna Nithi (death: 1 June 2013; 42 years old)</p>	<p>Nithi was arrested and remanded on 28 May 2013 following an alleged altercation with his spouse. He was further detained when his family was not able to raise bail after he was charged. On 1 June 2013, Nithi was found dead, and CCTV recordings showed him being assaulted by police and detainees. In 2015, the Coroner's Court ruled assault as the cause of death, which was upheld by the High Court. It is noteworthy that the AGC appealed against the high court decision in 2018, but subsequently discontinued it in 2019.</p> <p>The family has also filed civil action since 2018 to seek compensation over the authorities' alleged contravention of Nithi's fundamental right to liberty, and subsequently to challenge the time limit legal argument<sup>75</sup>. All civil actions failed, with the latest one at the Court of Appeal in October 2023 which upheld the Kuala Lumpur High Court's decision of dismissal of the lawsuit.</p>
<p>Shashikumar Selvam (death: 22 May 2015; 22 years old)</p>	<p>Selvam died whilst serving his 10-year sentence in Kluang Prison for stealing a bag of rice and two cans of sardines<sup>76</sup>, a sentence that was also grossly disproportionate to his offence. Selvam was detained since 13 June 2013. The post-mortem was done on the same day, with the case classified as sudden death – despite unexplained bruising on Selvam's body and circumstances of him reaching the ceiling to hang himself by his own trousers. Whilst Selvam's body remained in the mortuary, the Coroner's Court refused to hold an inquest in line with Section 334 of CPC. Neither did the Attorney-General</p>

73 Austin Camoens, 'Cops allegedly bashing suspect in custody to face action' (The Star, 12 October 2023)

<<https://www.thestar.com.my/news/nation/2023/10/12/cops-allegedly-bashing-suspect-in-custody-to-face-action>> accessed 10 November 2023

74 N. Trisha, 'Transparent and fair' investigation into alleged beating of detainee by two cops in Klang, says IGP' (The Star, 12 October 2023) <<https://www.thestar.com.my/news/nation/2023/10/12/039transparent-and-fair039-investigation-into-alleged-beating-of-detainee-by-two-cops-in-klang-says-igp>> accessed 10 November 2023

75 In bids to strike out Nithi's family's civil action, the police and government relied on Section 2(a) of the Public Authorities Protection Act 1948 to contend that his family's suit cannot be instituted as it was filed more than 36 months after Nithi's death.

76 'Why still no inquest into Shahshikumar's death?' (Malaysiakini, 2 June 2015) <<https://www.malaysiakini.com/news/300455>> accessed 20 November 2023

	<p>nor Chief Justice respond to requests for an inquest made by lawyers on behalf of Selvam’s family<sup>77</sup>.</p> <p>In 2017, the inquest was finally conducted, with prison officials testifying that Selvam might have faced threat to his life from officers involved in drug trafficking within the prison. The coroner ruled that Selvam’s death was homicide<sup>78</sup>. In 2018, Selvam’s grandmother, Sushilarani, filed a lawsuit against the Kluang prison authorities alleging negligence in his death. The government was also named as a defendant in the case. On 19 July 2023, the Johor Bahru High Court dismissed the lawsuit, on grounds that there was no evidence to support the family’s allegations that prison officers were involved in the “murder” of Selvam. The judge also ruled that Selvam did not demonstrate risk of self-harm – in the event of unforeseen suicide, the issue of duty of care does not arise. The court also rejected the family’s contention that the High Court was bound by the Coroner’s findings upon arriving at its decision, due to the loose admissibility of evidence in an inquest<sup>79</sup>.</p>
<p>Shainal Mukhtar (death: between 2 and 4 October 2019; 36 years old)</p>	<p>Between 2 and 4 October 2019, Shainal was restrained by wearing a straitjacket and placed in the isolation cell, as he was allegedly disturbing other inmates and did not provide full cooperation to the prison officers. He was allegedly beaten and at some stage, took blows to his head. By 4 October, he was found unconscious and taken to the hospital, subsequently pronounced dead upon arrival. Autopsy results showed that Shainal had bruises on his head and body.</p> <p>On 29 October 2019, 10 prison personnel were jointly charged under Section 302 of the Penal Code. The trial took place between 2019 and 2023. On 26 October 2023, five of the charged prison personnel were acquitted, and the remaining five pleaded guilty under Section 304A of the Penal Code and sentenced to a reduced charge of a RM1500 fine each in default one-month imprisonment. All five guilty officers paid the fine.</p>
<p>G Jestus Kevin</p>	<p>Kevin was arrested for theft and remanded on 2 April 2020 for four days pending investigations. On 4 April, he was moved</p>

77 ‘Hindraf slams CJ for silence over inmate’s death’ (Malaysiakini, 13 July 2015) <<https://www.malaysiakini.com/news/304967>> accessed 20 November 2023

78 Sheith Khidhir Bin Abu Bakar ‘Dead inmate’s friend fears for life after revealing prison drug racket’ (Free Malaysia Today, 15 November 2017) <<https://www.freemalaysiatoday.com/category/nation/2017/11/15/dead-inmates-friend-fears-for-life-after-revealing-prison-drug-racket/>> accessed 20 November 2023

79 ‘Court dismisses family’s negligence suit over death in custody’ (Free Malaysia Today, 19 July 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/07/19/court-dismisses-familys-negligence-suit-over-death-in-custody/>> accessed 20 November 2023

(death: 5 April 2020; 30 years old)	<p>to another cell occupied by two other inmates, due to his alleged state of delirium. He was allegedly assaulted by those inmates with the encouragement of on-duty police officers. He died on 5 April 2020. The inquest was eventually conducted in 2021.</p> <p>In April 2023, Kevin’s father filed a negligence suit against the two inmates, police and government at the Kuantan High Court, seeking damages for negligence, misfeasance in public office, breach of statutory duty, as well as assault and battery. In July 2023, the government dismissed the contention of the police’s role in the assault, claiming the responsibility to be solely on the inmates.</p>
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### Chain Remand

Chain remand occurs when an individual’s remand period granted by the Magistrate court has expired, yet he/she gets rearrested by the police for a different or similar offence upon the expiration of the remand order against them. In the past, SUARAM has documented cases in which individuals were detained in such a manner for up to three months and then placed in various lockups and detention centres in the country by the police.

As noted in SUARAM’s reports from previous years, the practice of re-arrests and chain remands through the concurrent application of SOSMA, POCA, and in limited cases, under POTA, is common. This is to ensure that the accused remains within police custody for extended investigations or incarceration for an indefinite period. It should be noted that the 2021 directive by Chief Justice Tengku Maimun Tuan Mat, which necessitated legal representation for any accused appearing in court for remand applications, may have reduced reliance on chain remand by the police.

To date, SUARAM has not received cases relating to the abuse of remand applications.

### Police Shootings

SUARAM monitors reported incidents of officers of the Royal Malaysian Police discharging their firearms while on duty. Our documentation noted 14 cases in 2023, attributing to nine deaths and three injured.

#### Police Shooting Incidents Documented by SUARAM in 2023

No.	Date	Location & State	No. of People Involved	Injured	Dead	Total Deaths (Month)
1	12 February	Banting/Klang, Selangor	1	0	0	0
2	7 April	Lahad Datu, Sabah	1	0	1	1
3	19 April	Kuantan, Pahang	1	0	0	
4	24 May	Hutang Melintang, Perak	1	0	1	1

5	4 & 6 June	Jalan Sibul-Bintulu and outside Betong Hospital, Sarawak	2	1	0	2
6	8 June	Cheras, Selangor	2	0	2	
7	9 June	Medan Selera Premba, Kedah	3	1	0	
8	7 August	Kepong, Selangor	2	0	0	0
9	25 September	Labok, Kelantan	2	0	1	1
10	10 October	Tumpat, Kelantan	8	0	0	0
11	23 October	Teluk Intan, Perak	2	1	0	
12	2 November	Kulim, Kedah	1	0	0	0
13	22 December	Selayang, Selangor	3	0	3	4
14	31 December	Butterworth, Penang	1	0	1	
<b>Total</b>			<b>30</b>	<b>3</b>	<b>9</b>	

In March 2023, the Court of Appeal lowered the quantum of damages from RM1.5 million to RM630,000 that was awarded to families of three youths aged 15, 20 and 22, who died in a police shooting in Shah Alam 13 years ago. The families' pursuit for justice spanned across 10 years. A joint civil suit was first filed by the families in 2013 at the Shah Alam High Court, which was then dismissed in 2015 on the grounds that the police officers acted out of self-defence. In 2016, this ruling was overturned by the Court of Appeal, and the case was sent to the High Court for damages assessment. The initial RM1.5 million was the result of an appeal by the three families to the High Court in 2021, after having obtained a much lower compensation amount totalling up to RM207,000<sup>80</sup>.

In October 2023, the Taiping High Court ordered the government and police to pay RM602,500 in damages to a former palm oil plantation worker Isma Izami Jaafar. Isma was shot at by police officers during a car chase seven years ago. 22 gunshots were discharged. As a result of the incident, Isma had to undergo surgical removal of bullet fragments from his brain. The civilian also testified that he suffered permanent brain damage and the loss of basic functions, including how to do simple arithmetic. The government has filed an appeal<sup>81</sup>.

80 Nurbaiti Hamdan, 'Court lowers damages for families of three men killed by police' (The Star, 24 March 2023)

<<https://www.thestar.com.my/news/nation/2023/03/24/court-lowers-damages-for-families-of-three-men-killed-by-police>> accessed 10 November 2023

81 'Police, govt to pay over RM600,000 for 'overzealous' car chase, shooting' (Free Malaysia Today, 3 October 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/10/03/police-govt-to-pay-over-rm600000-for-overzealous-car-chase-shooting/>> accessed 10 November 2023

## Enforced Disappearances

Despite the change in administration, accountability in cases relating to the enforced disappearances of Amri Che Mat and Pastor Raymond Koh remains precarious.

On 9 May 2023, the Kuala Lumpur High Court allowed the judicial review application by the spouse of activist Amri Che Mat<sup>82</sup>, Norhayati Mohd Ariffin, to access the classified special task force report to strengthen her related civil action against the police and federal government over Amri's disappearance in 2016<sup>83</sup>. The judge ordered the authorities to disclose the report to Norhayati within 30 days, but this report was to be utilised for the main legal action and cannot be disclosed to third parties. Nevertheless, the government and police filed an appeal for a stay of the report release, which was granted by the court on 7 June<sup>84</sup>. Three days later, Saifuddin stated that the government will review the steps that can be taken by the government in releasing the report<sup>85</sup>. He also dismissed allegations that the current government was sensitive about disclosing the classified report. Amri's spouse and daughter were set to testify in court on 21 June 2023 over the family's lawsuit over the enforced disappearance, but the proceedings were postponed due to technical issues of the judiciary's IT system<sup>86</sup>. The trial is expected to resume on 29 February 2024. On another note, on 11 December 2023, during the hearing of the government's appeal against the High Court 9 May decision, the Court of Appeal ordered the government to produce the classified special task force report. This was to enable the court to decide whether the report content would jeopardise national security as claimed by the government<sup>87</sup>.

Pastor Raymond Koh's<sup>88</sup> family also has an ongoing civil action against the police and government over Koh's enforced disappearance that took place in 2017.

- The first two days of trial took place on 6 and 7 June 2023 after postponement from 19 December 2022<sup>89</sup>, in which witness Roeshan Celestine Gomez testified that the

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82 Amri Che Mat was an alleged Syiah Islam follower and proselytiser. He disappeared on 24 November 2016 in Kangar, Perlis. A public inquiry held by SUHAKAM in 2019 concluded that he was a victim of enforced disappearance, with members of the Special Branch from police headquarters Bukit Aman as the perpetrators.

83 Hidir Reduan Abdul Rashid, 'Enforced disappearance: Amri's wife gets classified report' (Malaysiakini, 9 May 2023)  
<<https://www.malaysiakini.com/news/664447>> accessed 10 November 2023

84 Hidir Reduan Abdul Rashid, 'Govt, police appeal to prevent Amri's wife accessing classified report' (Malaysiakini, 7 June 2023)  
<<https://www.malaysiakini.com/news/667740>> accessed 10 November 2023

85 'Gov't to study release of report on Amri Che Mat's disappearance' (Malaysiakini, 10 June 2023)  
<<https://www.malaysiakini.com/news/668209>> accessed 10 November 2023

86 Hidir Reduan Abdul Rashid, 'Enforced disappearance: Amri's wife, daughter to testify in lawsuit' (Malaysiakini, 19 June 2023)  
<<https://www.malaysiakini.com/news/669180>> accessed 10 November 2023

87 'Court of Appeal to study classified report on missing activist' (Malaysiakini, 11 December 2023)  
<<https://www.malaysiakini.com/news/689674>> accessed 1 March 2024

88 Pastor Raymond Koh was abducted from his car in Petaling Jaya, Selangor on 13 February 2017. SUHAKAM's public inquiry also concluded that this was an enforced disappearance case, perpetrated by members of the Special Branch.

89 Hidir Reduan Abdul Rashid, 'Govt, pastor Koh's family attempting to resolve suit, court hears' (Malaysiakini, 19 December 2022)  
<<https://www.malaysiakini.com/news/648636>> accessed 10 November 2023

operation was “professionally done”<sup>90</sup>. Roeshan’s friend, who was allegedly present at the scene, was instructed to stop recording the incident. Roeshan was also signalled to leave the scene by one of the motorcycle outriders. Upon further cross-examination by the senior federal counsel (SFC) on the identity of the abductors, Roeshan said that he had no idea if they were police agents, as the black SUVs and masked men had no police logo on them<sup>91</sup>. Another notable point that Roeshan brought up was the remark made by the investigating officer (IO) upon lodging the police report about the abduction, that it looked “very much like the modus operandi of a police operation” and that the IO even made phone calls to confirm that there was a police operation that day. The SFC denied that the IO made such a statement<sup>92</sup>.

- Trial resumed in November 2023, in which witness G Sri Ram testified that rightwing Islamist groups threatened Pastor Koh in 2011, following the visit by the Selangor Islamic Religious Department (JAIS) and the police on a dinner hosted by Harapan Komuniti, an NGO that was headed by Koh<sup>93</sup>. The threats continued even after the Selangor Sultan decreed that no further action in investigations against the NGO. The witness reiterated his belief that it was the police who abducted Koh. Koh’s spouse Susanna Liew also testified that Koh received bullets and a death threat note following the raid<sup>94</sup>. Although a police report was lodged on the matter, no updates were received from authorities on investigation status despite multiple follow-ups.
- Susanna Liew continued to testify in the hearings that took place on 12 and 14 December 2023. She asserted that Koh’s abduction showed similar features to the 2010 police operation that detained Kelantan prince Tengku Muhammad Fakry Petra, citing the presence of multiple SUVs and police officers wearing balaclavas<sup>95</sup>. She disagreed with contentions put forward by the prosecution that the death threat package was wrongly mailed to their house and that Koh’s disappearance was unrelated to the JAIS raid<sup>96</sup>.

*“The government and the police have an obligation to investigate in good faith with due diligence any enforced disappearance, and the intention of the investigation must be to discover the truth and not to allege internal obstacles such as the Official Secrets Act, the lack of infrastructure or*

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90 Hidir Reduan Abdul Rashid, ‘Pastor Koh abduction was ‘professionally done’ - witness’ (Malaysiakini, 6 June 2023)

<<https://www.malaysiakini.com/news/667641>> accessed 10 November 2023

91 Hidir Reduan Abdul Rashid, ‘Witness ‘has no idea’ if Pastor Koh abductors were police agents’ (Malaysiakini, 7 June 2023)

<<https://www.malaysiakini.com/news/667785>> accessed 10 November 2023

92 Hidir Reduan Abdul Rashid, ‘IO never said Pastor Koh abduction looked like police operation, court told’ (Malaysiakini, 20 June 2023) <<https://www.malaysiakini.com/news/669301>> accessed 10 November 2023

93 Hidir Reduan Abdul Rashid, ‘Witness: Rightwing Islamist groups threatened Pastor Koh in 2011’ (Malaysiakini, 6 November 2023) <<https://www.malaysiakini.com/news/685618>> accessed 10 November 2023

94 Hidir Reduan Abdul Rashid, ‘Missing Pastor Koh received two bullets, death threat, wife tells court’ (Malaysiakini, 7 November 2023) <<https://www.malaysiakini.com/news/685705>> accessed 10 November 2023

95 Hidir Reduan Abdul Rashid, ‘Pastor Koh’s abduction similar to Kelantan prince’s 2010 arrest’ (Malaysiakini, 12 December 2023) <<https://www.malaysiakini.com/news/689764>> accessed 1 March 2024

96 Hidir Reduan Abdul Rashid, ‘I want the truth behind Pastor Koh’s enforced disappearance: Wife’ (Malaysiakini, 14 December 2023) <<https://www.malaysiakini.com/news/690034>> accessed 1 March 2024

*staff, in order to escape their obligation to investigate. All I want is justice. I want to know the truth on where my husband is and what happened to him.”*

- Susanna Liew, when taking the witness stand at Kuala Lumpur High Court on 14 December 2023

## **Recommendations**

Accounting for progress, gaps and developments encapsulated in the chapter, SUARAM calls for:

- Amend the Independent Police Conduct Commission Act to include provisions in the Independent Police Complaints and Misconduct Commission (IPCMC) Bill to improve police transparency and accountability. This includes providing the Commission with disciplinary powers. Prior to and during amendments, inclusive consultations with civil society should be held;
- Make all data on deaths in custody publicly available and accessible;
- Amend the Criminal Procedural Code to mandate inquests for all custodial deaths in all detention, correctional and rehabilitation facilities operated by the government;
- Enact a Coroner Court’s Act to ensure high quality of inquests;
- Amend the National Human Rights Commission of Malaysia (SUHAKAM) Act to enable visits to places of detention without prior notice;
- Undertake a comprehensive study on reform for immigration depots and make appropriate recommendations on measures to address and prevent deaths in custody;
- Ratify the International Covenant on Civil and Political Rights; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT); as well as the International Convention for the Protection of All Persons from Enforced Disappearance.



FREEDOM  
OF  
EXPRESSION

# FREEDOM OF EXPRESSION

*SUARAM*

Enforcement of existing laws that restrict freedom of expression, such as the Sedition Act (SA) 1948 and Section 233 of the Communications and Multimedia Act (CMA) 1998, resumes under Dato Seri Anwar Ibrahim's administration. Review and repeal of "oppressive legislations that can be misused curtail freedom of expression", including the SA 1948 and Section 233 of CMA 1998, was a key promise within Pakatan Harapan's election manifesto last year<sup>97</sup>. Nevertheless, this palpable hope for reform was dashed when the government announced that it has no intention to abolish the SA 1948<sup>98</sup>. Review of Section 233 of CMA 1998 is also only confined to ensuring how investigations can be carried out more smoothly<sup>99</sup>, which still does not address the longstanding arbitrary use of this legislative provision in cracking down on any content that is perceived to be 'offensive' and silencing critics. Engagements with stakeholders in government, industry players and civil society were expected to carry out in November 2023 – although there have been no updates since<sup>100</sup>. Whilst the government has commendably agreed in principle to review the use of SA 1948 to confine its use to statements directed at the royal institution<sup>101</sup>, this is still in breach of international standards of freedom of expression.

Engagements were undertaken by the Minister in the Prime Minister's Department (Law and Institutional Reforms) Dato' Sri Azalina Othman Said in July 2023 with various stakeholders, including non-governmental organisations, to review the effectiveness of dealing with issues related to race, religion and royalty (3R)<sup>102</sup>. The outcome of these sessions was open-ended. No concrete consensus emerged on which of the three options were most relevant and feasible: maintain the status quo, repeal existing laws and replace them with new ones, or repeal the SA 1948 and replace it with a more specific legislation. Despite the government's initiative to engage, the political will for substantive reform in the SA 1948 and Section 233 of CMA 1998 remains precarious. This is substantiated by the swift backpedalling to the narrative used by previous administrations of the adequacy of

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97 Refer to <https://kitaboleh.my/tawaran-kita-boleh/menjamin-kebebasan-media-dan-hak-bersuara/>

98 Jason Thomas, 'No plans to abolish Sedition Act just yet, says Ramkarpal' (Free Malaysia Today, 21 March 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/03/21/no-plans-to-abolish-sedition-act-just-yet-says-ramkarpal/>> accessed 20 November 2023

99 'Efforts to review 'Akta Sakit Hati' underway - deputy minister' (Malaysiakini, 1 March 2023) <<https://www.malaysiakini.com/news/656901>> accessed 20 November 2023

100 Oral Question in Parliament, Question 11, 24 October 2023

101 'Cabinet to review Sedition Act, use only to protect royalty, says Azalina' (The Star, 25 July 2023) <<https://www.thestar.com.my/news/nation/2023/07/25/cabinet-to-review-sedition-act-use-only-to-protect-royalty-says-azalina>> accessed 20 November 2023

102 Arfa Yunus, 'Several options proposed to tackle 3R issues, says Azalina' (The Star, 21 July 2023) <<https://www.thestar.com.my/news/nation/2023/07/21/several-options-proposed-to-tackle-3r-issues-says-azalina>> accessed 20 November 2023

existing laws in tackling 3R matters, explicitly stated<sup>103</sup> or implied<sup>104</sup>. In the case of the Deputy Home Minister Shamsul Anuar Nasarah, prevention of exploitation by irresponsible parties was even used as a basis for having no current plans to enact specific laws or guidelines on 3R issues<sup>105</sup>. This is especially ironic, given that Azalina previously acknowledged that the SA 1948, CMA 1998 and other laws have not been revised for decades and are in need of review to ensure relevance with current national developments<sup>106</sup>. Lawmakers, including the Prime Minister Dato' Seri Anwar Ibrahim<sup>107</sup>, have also justified continued application of especially the SA 1948 on the basis of unavoidable necessity, i.e., maintaining national security and stability, and public order.

2023 also witnessed an increase in explicit hardline rhetoric and measures to curb 3R discourse. Multiple warnings were delivered from time to time by lawmakers, including Anwar<sup>108</sup>, aside from the seasonal ones in the lead-up to state elections<sup>109</sup>. A 3R task force was set up on 22 March. Seven cases were received within the first two weeks of operation, with three cases referred to the Attorney-General's Chambers by the end of that period<sup>110</sup>. By November 2023, the task force handled a total of 104 cases, of which 44 were still being investigated<sup>111</sup>.

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103 'No plan to change current laws related to governing 3R issues' (The Star, 8 November 2023)

<<https://www.thestar.com.my/news/nation/2023/11/08/no-plan-to-change-current-laws-related-to-governing-3r-issues>> accessed 20 November 2023

104 Oral Question in Parliament, Question 24, 7 November 2023

105 Rahimy Rahim, Junaid Ibrahim and Teh Athira Yusof, 'Discussing 3R issues is allowed as long as no laws are broken, Dewan Rakyat told' (The Star, 14 November 2023) <<https://www.thestar.com.my/news/nation/2023/11/14/discussing-3r-issues-is-allowed-as-long-as-no-laws-are-broken-dewan-rakyat-told>> accessed 20 November 2023

106 Imran Hilmy, 'Cabinet to be briefed on 3R discussions' (The Star, 25 July 2023)

<<https://www.thestar.com.my/news/nation/2023/07/25/cabinet-to-be-briefed-on-3r-discussions>> accessed 20 November 2023

107 Luqman Hakim, 'Anwar gives final warning to those playing up 3R issues [NSTTV]' (New Straits Times, 12 July 2023)

<<https://www.nst.com.my/news/nation/2023/07/930021/anwar-gives-final-warning-those-playing-3r-issues>> accessed 20 November 2023

108 Luqman Hakim, 'Anwar gives final warning to those playing up 3R issues [NSTTV]' (New Straits Times, 12 July 2023)

<<https://www.nst.com.my/news/nation/2023/07/930021/anwar-gives-final-warning-those-playing-3r-issues>> accessed 20 November 2023

109 'Anwar gives final warning to those playing up 3R issues [NSTTV]' (The Star, 3 July 2023)

<<https://www.thestar.com.my/news/nation/2023/07/03/state-polls-cops-to-monitor-those-playing-up-3r-issues-says-igg>> accessed 20 November 2023

110 Farik Zolkepli, 'Police task force opens seven IPs into issues touching on royalty, religion and race' (The Star, 8 April 2023)

<<https://www.thestar.com.my/news/nation/2023/04/08/police-task-force-opens-seven-ips-into-issues-touching-on-royalty-religion-and-race>> accessed 20 November 2023

111 Mohamad Fadli, 'No plans to enact specific 3R laws, says home ministry' (Free Malaysia Today, 14 November 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/11/14/no-plans-to-enact-specific-3r-laws-says-home-ministry/>> accessed 1 March 2024

## Sedition Act 1948

SUARAM's media monitoring of SA 1948 cases documented a spike by close to 65% between 2022 and 2023, with corresponding increases in the number of investigations, arrests and charges conducted.

### SUARAM-Documented Cases of Sedition Act 1948

	2022	2023
Investigated only	6	11
Arrested and/or Remanded	9	13
Charged	1	4
Sentenced	1	0
<b>Total</b>	<b>17 (54*)<sup>112</sup></b>	<b>28</b>

In fact, according to SUARAM's documentation, case numbers have risen to the level seen during the Perikatan Nasional administration in 2021, which is the highest in six years.

2018	2019	2020	2021	2022	2023
10	12	24	28	17	28

Out of the 24 cases that remained at the investigation stage, all except two entailed at least Section 233 of CMA 1998 aside from Section 4(1) of the SA 1948. The said exceptions involved the remark by the President of the Pan-Malaysian Islamic Party questioning the authorisation of the Pardons Board during a political talk held in conjunction with the Simpang Jeram by-election; and a civilian's remarks that the government is pro-Israel. Out of the four cases tried at court, three took place in 2023, all of which involved politicians from the Opposition. The aforementioned three cases comprised slightly over 10% of cases occurring in 2023 that met the threshold for them to be charged in court. This proportion is significantly reduced to less than 2% of the 960 cases under the SA 1948 investigated by the government between 2010 and September 2023<sup>113</sup>. Though touted by the government that use of the SA 1948 has not been indiscriminate, the wide margins between investigation and prosecution rates, in reality, demonstrate arbitrary application of the law to stifle speech.

The application of the SA 1948 does not reflect the government's consideration of confining the scope of the legislation's application to 'insults' against royalty, which consisted of only just over 40% of cases. Among cases tried in court, only one was related to 'insults' against royalty which took place the year before – all other charged cases involving

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112 \*Number in brackets denotes the case numbers disclosed by the government and not documented by SUARAM. Cases documented by SUARAM is significantly lower due to unreported arrests, charges and convictions. Case numbers obtained from: <https://www.thestar.com.my/news/nation/2023/03/21/home-minister-255-investigated-for-sedition-from-2020-to-2022-only-four-charged>

113 Mohamad Fadli, 'No plans to enact specific 3R laws, says home ministry' (Free Malaysia Today, 14 November 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/11/14/no-plans-to-enact-specific-3r-laws-says-home-ministry/>> accessed 1 March 2024

incidents in 2023 entailed ‘disaffection’ against the administration of justice and those currently in public office.

**List of Individuals/Groups Investigated Under the Sedition Act 1948**

No.	Name of Individual(s)	Allegation/Cause for Investigation	Status	Other Laws Investigated
1	1 individual	Video with derogatory remark against the royal institution (15 Mar)	Investigated	s4(1) of SA 1948, s233 of CMA 1998, s505(b) of the Penal Code
2	Roslizal Razali	Racist comments on X	Arrested & remanded	s4(1) of SA 1948, s233 of CMA 1998, s505c of the Penal Code
3	Owner of Facebook account ‘Raja Hairun’	Online insult against the royal institution	Arrested & remanded (12–14 Apr)	s4(1) of SA 1948, s233 of CMA 1998
4	Abdul Rahim Abdullah	Facebook posts insulting the Yang di-Pertuan Agong (2-3 Apr)	Arrested & remanded (5-8 Apr)	s4(1) of SA 1948, s233 of CMA 1998
5	Muhammad Indera Mulia Ahmad	Online offensive communications against Sultan of Johor (21 Apr)	Arrested (24 Apr)	s4 of SA 1948, s233 of CMA 1998
6	Owner of Facebook account ‘Nong Mazlan’	Three seditious posts	Arrested & remanded (6–9 May)	s4(1) of SA 1948, s233 of CMA 1998, s504 of the Penal Code
7	Owner of Twitter account @hezryhaizad	Two racist posts	Arrested & remanded (8–11 May)	s4(1) of SA 1948, s233 of CMA 1998, s505c of the Penal Code
8	Tun Dr Mahathir Mohamad	Remarks against the royal institution in a “Malay Proclamation” meeting (6 June)	Investigated	s4(1) of SA 1948, s233 of CMA 1998

9	Shahidan Kassim	Remarks against the PN's plan to topple the govt	Investigated	s4(1) of SA 1948, s233 of CMA 1998
10	1 individual	Offensive remarks against the Yang Di-Pertuan Agong regarding award conferment to Tan Sri Lim Kit Siang (7 June)	Arrested & released on 13 June <sup>114</sup>	s4(1) of SA 1948, s233 of CMA 1998
11	1 individual	Facebook post insulting the royal institution	Arrested & remanded (23-25 June)	s4(1) of SA 1948, s233 of CMA 1998, s500 of the Penal Code
12	Lim Guan Eng	Remark that temples will be destroyed if the 'green wave' takes over Penang (7 July)	Investigated	s4(1) of SA 1948, s233 of CMA 1998, s505b of the Penal Code
13	Tan Sri Abdul Hadi Awang	Remark of DAP's plan to destroy Malay and Bumiputera supremacy with the support of Malays who have forgotten their roots (8 July)	Investigated	s4(1) of SA 1948, s233 of CMA 1998
14	Owner of Facebook account @SamBanjar Perak	Online insult against the Yang Di-Pertuan Agong	Arrested & remanded (15 Aug – 18 Aug)	s4(1) of SA 1948, s233 of CMA 1998
15	Unreported	Allegations of 200 tahfiz schools in Selangor being ordered to close	Investigated (mid-Aug)	s4(1) of SA 1948, s233 of CMA 1998, s505(b) of the Penal Code
16	Tan Sri Abdul Hadi Awang	Statement questioning the authorisation of the Pardons Board in political talk during Simpang Jeram by-election (26 Aug)	Investigated	s4(1) of SA 1948

<sup>114</sup> Upon arrest, the police also seized the individual's laptop, mobile phone and SIM card for further investigations. The woman was released on police bail on the day of arrest, based on her claim that she was six months pregnant.

17	Mohamad Azlan	Online insult against the Sultan of Selangor (28 Aug)	Investigated <sup>115</sup>	s4(1) of SA 1948, s233 of CMA
18	Datuk Seri Muhammad Sanusi Md Nor	Statement at a political talk before the Pelangai by-election (22 Sep)	Investigated (10 Oct)	s4(1) of SA 1948, s233 of CMA 1998, s4A(1) of the Election Offences Act 1954
19	Shahril Azman Abd Halim	Speech related to 3R made in Felda Sungai Kemahal before the Pelangai by-election	Investigated	s4(1) of SA 1948, s233 of CMA 1998, s505(b) of the Penal Code
20	Owner of Facebook account 'Muhammad Farhan'	Online insult against the royal institution	Arrested & remanded (12–15 Oct)	s4(1) of SA 1948, s233 of CMA 1998
21	Owner of TikTok account @azwanar9	Online insult against the royal institution	Arrested & remanded (13–16 Oct)	s4(1) of SA 1948, s233 of CMA 1998
22	Wan Muhammad Azri Wan Deris	Remarks that government is pro-Israel (8 Nov)	Investigated	s4(1) of SA 1948
23	1 individual	Online insult against the Yang Di-Pertuan Agong	Remanded (28–30 Nov)	s4(1) of the Sedition Act 1948, s233 of CMA 1998
24	Victor Yong	Statements supporting diplomatic ties between Malaysia and Israel in an interview with an Israeli social media influencer	Arrested and remanded (6-8 Dec)	s4(1) of SA 1948, s233 of CMA 1998, s505(b) of the Penal Code

<sup>115</sup> Subsequently charged and sentenced to six months of jail and a RM10,000 fine or three months prison in default, under s233 of CMA 1998

### New Cases Charged Under the Sedition Act 1948 in 2023

No.	Name of Individual(s)	Allegation/Cause for Investigation	Status	Laws Charged
1	William Khor Wai Loon	Seditious words insulting the Yang di-Pertuan Agong (20 Nov 2022)	Pleaded not guilty (1 Mar 2023)	s4(1)(a) of SA 1948
2	Datuk Seri Muhammad Sanusi Md Nor	Remarks on the appointment of Selangor Menteri Besar during political talk (11 July)	Pleaded not guilty (4 Oct)	s4(1)(b) of SA 1948
3		Remarks on Dato Seri Anwar Ibrahim's statement on the Royal Decree and the unity govt's establishment during political talk (11 July)	Pleaded not guilty (4 Oct)	s4(1)(b) of SA 1948
4	Datuk Razali Idris	Remarked that decisions of the judiciary were being controlled by the govt at the Kemaman by-election machinery launch (10 Nov)	Pleaded not guilty (24 Nov)	s4(1) of SA 1948

As for recent developments of cases investigated or charged under the SA 1948 prior to 2023, there were two notable ones.

#### **Wan Ji's Jail Sentence**

Religious preacher Wan Ji Wan Hussin was ordered to commence his nine-month prison sentence from 26 September 2023<sup>116</sup>. Wan Ji was first charged under Section 4(1) of SA 1948 in 2012 for publishing offensive words and insulting the Selangor Sultan via Facebook, to which he pleaded guilty two years later and received the said jail sentence. At the time, Wan Ji's sentence marked a concerning increase in severity of punishment, as most sedition cases at the High Court or Court of Appeal then were primarily limited to fines. Despite Pakatan Harapan's promise prior to the 14th General Election to repeal the SA 1948, the prosecution appealed, and successfully, to enhance Wan Ji's jail sentence instead to one year when the coalition came to power in 2019<sup>117</sup>. Wan Ji managed to get a stay pending the outcome of his appeal to the sentence for 2018 and 2019. He subsequently submitted his application to refer constitutional issues involving

<sup>116</sup> 'Wan Ji starts jail sentence for royal insult' (The Star, 26 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/26/wan-ji-starts-jail-sentence-for-royal-insult>> accessed 20 November 2023

<sup>117</sup> Annabelle Lee, 'Insulting royalty - preacher Wan Ji's sentence enhanced, begins jail term today' (Malaysiakini, 9 July 2019)

<<https://www.malaysiakini.com/news/483022>> accessed 20 November 2023

the SA to the Federal Court, which was eventually rejected by the Court of Appeal in August 2023<sup>118</sup>.

### **Kean Wong's Arrest and Overnight Detention**

On 16 October 2023, book editor Kean Wong was arrested at the Kelana Jaya Immigration Department whilst there for passport renewal. He was subsequently detained overnight, and only released upon completion of the one-day remand period<sup>119</sup>. Wong has been on the police's suspect person list since 2020<sup>120</sup>, over a cover art resembling the national-coat-of-arms for the book that he edited 'Rebirth: Reformasi, Resistance, and Hope in New Malaysia'. Responses by authorities in 2020 were unwarranted, including a ban of the book under the Printing Presses and Publications (Control of Undesirable Publications) Order 2020<sup>121</sup>, probes of cover artist and chapter writers<sup>122</sup>, and a raid of the publisher to seize 313 copies of the book<sup>123</sup>. Three years later, three out of the four legislations still applied in police investigations against Wong: Section 4(1) of the SA 1948, Section 233 of the CMA 1998, and Section 8(1) of the Printing Presses and Publications Act 1984.

### **Communications and Multimedia Act 1998**

Section 233 of the CMA 1998 criminalises speech made with the intent to 'annoy, abuse, threaten or harass another person', including anonymous communications. The ambiguity of the language, lack of clear definition of what is deemed 'offensive' and criminalising the act of 'annoying people online' are among the many reasons why Section 233 is problematic. Unlike the SA 1948, Section 233 of the CMA 1998 does not require the communication to be seditious, or to have the intention to incite violence or to instigate the commission of any offence.

#### **SUARAM-Documented Cases of Section 233 of CMA 1998**

	<b>2022</b>	<b>2023</b>
Investigated	49	51
Arrested and/or Remanded	19	25

118 'Wan Ji fails to get constitutional issues on sedition charges referred to apex court' (The Star, 14 August 2023)

<<https://www.thestar.com.my/news/nation/2023/08/14/wan-ji-fails-to-get-constitutional-issues-on-sedition-charges-referred-to-apex-court>> accessed 20 November 2023

119 'CID chief: 'Rebirth' editor freed after remand ends' (Malaysiakini, 17 October 2023)

<<https://www.malaysiakini.com/news/683173>> accessed 20 November 2023

120 Faisal Asyraf, 'Rebirth' editor gave contact details, Aussie address to cops, says his lawyer' (Malaysiakini, 18 July 2020)

<<https://www.malaysiakini.com/news/535019>> accessed 20 November 2023

121 'Home Ministry bans book with cover art resembling national coat of arms' (Malaysiakini, 1 July 2020)

<<https://www.malaysiakini.com/news/532654>> accessed 20 November 2023

122 'Cops quiz artist in 'Rebirth' book cover probe' (Malaysiakini, 4 July 2020) <<https://www.malaysiakini.com/news/532939>> accessed 20 November 2023

123 'Police raid company linked to controversial book cover, seize 313 books' (Malaysiakini, 1 July 2020)

<<https://www.malaysiakini.com/news/532448>> accessed 20 November 2023

Charged	16	15
Sentenced	17	6
<b>Total</b>	<b>101</b>	<b>97</b>

Despite the reduction in overall number of cases between 2022 and 2023, SUARAM notes an increase in the number of arrests made for investigations by over 30%. Resounding observations by the Centre for Independent Journalism<sup>124</sup>, SUARAM similarly notes a long remand period of three to four days, which given the nature of the alleged actions, is both disproportionate and unnecessary.

Similar to the SA 1948, low rates of cases tried and/or sentenced, i.e., lower than 10%, is indicative of arbitrary application of Section 233.

	<b>Government Figures (Jan 2018 – Nov 2023)</b>	<b>SUARAM’s Media Monitoring (Jan – Dec 2023)</b>
Investigated	876	84
Charged/Sentenced	<b>65 (7.4%)</b>	<b>8 (9.5%)</b>

The broadness of Section 233 heightens its potential for abuse to investigate and prosecute 3R cases. 46.9% of all cases in 2023 entailed online content related to 3R. There is also likely an increase in use of Section 233, instead of the SA 1948, to prosecute remarks related to royalty. Whilst Section 4(1) of SA 1948 was included in investigations against ‘insults’ related to royalty, this provision was not a part of the charge for all nine charged cases – it was Section 233(1) instead.

Similar to 2022, Section 233 continues to be widely used to address fake news and address any online discourse that is deemed to be ‘offensive’. A significant example is the arrest and four-day remand of two 18-year-olds for criticising the 2023 Sijil Pelajaran Malaysia (SPM) History paper, which took place after a teacher lodged a report about the said video. Fundamentally, this matter should have been confined to the school authorities, and the teacher should have lodged an internal complaint that would have enabled key stakeholders within the school such as the disciplinary board and counselling unit to take responsive action. Nevertheless, the ambiguous Section 233 provided law enforcement unfettered discretion in interpreting and enforcing the provision. In the context of frustration venting by two students of an exam paper, arrest and detention, alongside a raid of the students’ homes, confiscation of their phones and being forced to undergo drug tests<sup>125</sup>, are illegitimate, unnecessary and disproportionate, thus severely encroaching on freedom of speech.

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124 Wathshlah G Naidu, Dineshwara Naidu and Cynthia Lorraine Silva, ‘A report on state of freedom of information in Malaysia 2023’ (Centre for Independent Journalism, December 2023) <[https://cijmalaysia.net/wp-content/uploads/2023/12/CIJ\\_FoE\\_Report.pdf](https://cijmalaysia.net/wp-content/uploads/2023/12/CIJ_FoE_Report.pdf)> accessed 5 March 2024

125 ‘LFL: Arrest of 2 teens over video rant on SPM paper heavy-handed’ (Malaysiakini, 26 February 2023) <<https://www.malaysiakini.com/news/656500>> accessed 20 November 2023

SUARAM also notes four investigations on online content from 2022 that not only constitute a waste of limited police resources, but also at the same time unwarrantedly curtails freedom of opinion and expression.

- The first two entailed lawyers Datuk Ambiga Sreenevasan and Siti Kasim being called in to give their statements, in light of their participation as panellists in the forum ‘Dark Forces Towards 15th General Election’ held on 17 September 2022. Three months prior in October 2022, two other panellists, namely Tan Sri Tommy Thomas and Dr. Michael Jayakumar, were also investigated under Section 233.
- The remaining two investigations were against Farhan Iqbal and Noor Suhana Ishak, aides to Economic Affairs Minister YB Rafizi Ramli and Bentong member of Parliament YB Young Syefura Othman. Both individuals were called in for questioning over a tweet linking UMNO youth to the commotion<sup>126</sup> that took place during MUDA’s political talk in Muar, Johor. Their phones were also confiscated. These investigation papers were not only unwarranted when the priority should have been on individuals causing the commotion, but also unnecessary when a probe on the same matter was done earlier by the Malaysian Communications and Multimedia Commission in October 2022<sup>127</sup>.

**List of Individuals/Groups Investigated/Arrested Under Section 233 of CMA**

No.	Name of Individual(s)	Allegation/Cause for Investigation	Status	Laws Investigated
1	Muhammad Fawwaz Mohamad Jan	Online post about infidels making efforts to topple Islam (Jan)	Investigated	s233 of CMA 1998, s505c of the Penal Code
2	Datuk Ambiga Sreenevasan	Statements related to racial sensitivities from forum in September 2022	Investigated (19 Jan)	s233 of CMA 1998, s505 of the Penal Code
3	Siti Kasim			
4	Farhan Iqbal	A tweet linking UMNO youth to the commotion during MUDA’s political talk in October 2022	Investigated (26 Jan)	s233 of CMA 1998, s500 of the Penal Code
5	Noor Suhana Ishak			
6	fatinamyralee	TikTok video of racial slur at a concert in the National Stadium in Bukit Jalil (28 Jan)	Investigated (2 Feb)	s233 of CMA 1998

<sup>126</sup> A group of 30 youths caused a commotion by revving their motorcycles and called then MUDA President YB Syed Saddiq Syed Abdul Rahman a liar when was delivering a speech.

<sup>127</sup> Elill Easwaran, ‘Cops seize phones belonging to Rafizi, DAP MP’s aides’ (Free Malaysia Today, 26 January 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/01/26/cops-confiscate-phone-of-dap-mps-aide/>> accessed 1 March 2024

7	1 individual	TikTok video of on-duty traffic police inspecting a lorry and issuing four summonses (4 Feb)	Arrested & remanded (4–7 Feb)	s233 of CMA 1998, s504 of the Penal Code
8	2 individuals	TikTok video in which they complained about a secondary school history exam paper	Arrested & remanded (24–27 Feb)	s233 of CMA 1998, s14 of the Minor Offences Act 1995
9	Halimah Nasoha	Online posts criticising Dato’ Seri Anwar Ibrahim’s trip to Saudi Arabia in March	Investigated	s233(1)(a) of CMA 1998
10	Tan Sri Abdul Hadi Awang	Remarks of PN’s attempt to topple the unity govt (4 Mar)	Investigated	s233 of CMA 1998, s505b of the Penal Code
11	Unreported number of individuals	Viral video of a man defaming Anwar on a 4-wheel drive using a loudspeaker outside Jalan Duta Court (11 Mar)	Investigated	s233 of CMA 1998, s500 of the Penal Code, s9(5) of the Peaceful Assembly Act 2012
12	Khairi Anwar Jailani	<i>Mentega Terbang</i> film exploring religion and death	Investigated	s233 of CMA 1998, s298A & s505b of the Penal Code
13	Arjun Thanaraju			
14	5 individuals			
15	1 individual	Video with derogatory remark against the royal institution (15 Mar)	Investigated	s233 of CMA 1998, s4(1) of SA 1948, s505(b) of the Penal Code
16	Facebook account ‘Che’Gubard Original’	Online post linking the Youth & Sports Ministry with a Christian Evangelist movement	Investigated (17 Mar)	s233 of CMA 1998, s500 of the Penal Code
17	Unreported	Video of police extortion case	Investigated	s233 of CMA 1998, s384 of the Penal Code
18	Unreported	Video of a couple in an indecent act in a car park	Investigated	s233 of CMA 1998
19	1 individual	Video of kicking and damaging a mosque’s door (9 Apr)	Detained & released on bail	s233 of CMA 1998, s295 of the Penal Code

20	Unreported number of individuals	Investment scheme poster with Perlis Menteri Besar's image	Investigated	s233 of CMA 1998, s500 of the Penal Code
21	Unreported	Video of a man spitting into a food mix prepared at a Ramadan bazaar (19 Apr)	Investigated	s233 of CMA 1998
22	Unreported	WhatsApp message claiming that the police barred Hindu devotees from holding a religious activity at a temple	Investigated	s233 of CMA 1998, s505(B) of the Penal Code
23	Roslizal Razali	Racist comments on X	Arrested & remanded	s233 of CMA 1998, s4(1) of SA 1948, s505c of the Penal Code
24	Owner of Facebook account 'Raja Hairun'	Online insult against the royal institution	Arrested & remanded (12–14 Apr)	s233 of CMA 1998, s4(1) of SA 1948
25	Alimuddin Mohd Hayat <sup>128</sup>	A text on Facebook that insulted Islam (26 April)	Arrested & remanded	s233(1)(a) of CMA 1998
26	1 individual	Allegation of senior police officer's refusal to accept his complaint	Investigated	s233 of CMA 1998, s500 of the Penal Code
27	Unreported	Several pornographic videos containing use of unconsented photos of a woman and her family members	Investigated	s233 of CMA 1998, s509 of the Penal Code, s15(a) of the Sexual Offences Against Children Act 2017
28	Owner of Facebook account 'Nong Mazlan'	Three seditious posts	Arrested & remanded (6–9 May)	s233 of CMA 1998, s4(1) of SA 1948, s504 of the Penal Code
29	Owner of Twitter account @hezryhaizad	Two racist posts	Arrested & remanded (8–11 May)	s233 of CMA 1998, s4(1) of SA

<sup>128</sup> Alimuddin was charged in a Johor Sessions Court in 2023, but the case was thrown out due to technical issues. There would thus be another trial in 2024.

				1948, s505c of the Penal Code
30	An individual	A video about the 'salam' greeting that insulted Islam	Arrested & remanded (9-12 May)	s233 of CMA 1998, s298A(1) of the Penal Code
31	An individual	A Facebook picture of a woman with a holy word in Arabic script tattooed on her body	Arrested & remanded (23-25 May)	s233 of CMA 1998, s298A of the Penal Code
32	An individual	Tweet insulting the royal institution and making racially provocative statements	Arrested & remanded (25-27 May)	s233 of CMA 1998
33	Unreported	Video of shoplifting	Investigated	s233 of CMA 1998
34	1 individual	Telegram account that discusses obscene issues	Investigated	s233 of CMA 1998
35	Unreported	Poster on planned orgy (24 May)	Investigated	s233 of CMA 1998, s292(e) of the Penal Code
36	Datuk Seri Muhammad Sanusi Md Nor	Remarks that Kedah owns Penang (late May)	Investigated	s233 of CMA 1998, s505b of the Penal Code
37	Tun Dr Mahathir Mohamad	Remarks against the royal institution in a "Malay Proclamation" meeting (6 June)	Investigated	s233 of CMA 1998, s4(1) of SA 1948
38	Jocelyn Chia	Stand-up comedy about Malaysia as a developing country and the MH370 tragedy (7 June)	Investigated	s233 of CMA 1998, s504/506(C) of the Penal Code
39	1 individual	Offensive remarks against the Yang Di-Pertuan Agong regarding award conferment to Tan Sri Lim Kit Siang (7 June)	Arrested & released on 13 June <sup>129</sup>	s233 of CMA 1998, s4(1) of SA 1948

<sup>129</sup> The woman was released on police bail on the day of arrest, based on her claim that she was six months pregnant.

40	1 individual	Facebook post insulting the royal institution	Arrested & remanded (23-25 June)	s233 of CMA 1998, s4(1) of SA 1948, s500 of the Penal Code
41	Badrul Hisham Shaharin @ Chegubard	TikTok video accusing Dato' Seri Anwar Ibrahim of selling out Malaysia's sovereignty (June)	Arrested (14 Sep)	s233 of CMA 1998
42	Shahidan Kassim	Remarks against the PN's plan to topple the govt	Investigated	s233 of CMA 1998, s4(1) of SA 1948
43	Lim Guan Eng	Remark that temples will be destroyed if the 'green wave' takes over Penang (7 July)	Investigated	s233 of CMA 1998, s4(1) of SA 1948, s505b of the Penal Code
44	Tan Sri Abdul Hadi Awang	Remark of DAP's plan to destroy Malay and Bumiputera supremacy with the support of Malays who have forgotten their roots (8 July)	Investigated	s233 of CMA 1998, s4(1) of SA 1948
45	3 individuals	Fight in front of a polyclinic, with video going viral (19 July)	Arrested and remanded (20-24 July)	s233 of CMA 1998, s148 of the Penal Code
46	Fake Facebook account	Bore the name and photos of the spouse of Tunku Mahkota Johor, promoting Japanese air conditioners	Investigated	s233 of CMA 1998, s419 of the Penal Code
47	Facebook account 'Whyman Whyman'	Video of a woman being assaulted by two men and two women	Investigated	s233 of CMA 1998, s147 of the Penal Code
48	Tan Sri Muhyiddin Yassin	Remark that Allah issue is indicative of unity govt run by non-Malays (30 July)	Investigated	s233 of CMA 1998, s505c of the Penal Code
49	Fahmi Fadzil	Speech in main prayer hall of Nurul Yaqin Mosque (31 July)	Investigated	s233 of CMA 1998

50	1 individual	Uploaded and shared video of Fahmi Fadzil speaking in mosque	Investigated	s233 of CMA 1998, s500 of the Penal Code, s4A(1) of the Election Offences Act 1954
51	Afnan Hamimi Taib Azamudden	Statement of caretaker Kedah Menteri Besar's absence at mega event due to safety reasons (8 Aug)	Investigated	s233 of CMA 1998, s505b of the Penal Code
52	Three individuals			
53	Owner of Facebook account @SamBanjar Perak	Online insult against the Yang Di-Pertuan Agong	Arrested & remanded (15-18 Aug)	s233 of CMA 1998, s4(1) of SA 1948
54	Unreported	Allegations of 200 tahfiz schools in Selangor being ordered to close	Investigated (mid-Aug)	s4(1) of SA 1948, s233 of CMA 1998, s505(b) of the Penal Code
55	PAS	Post about 54,000 Chinese nationals being set to receive Malaysian citizenship (28 Aug)	Investigated	s233 of CMA 1998, relevant provisions of the Penal Code
56	Tan Sri Muhyiddin Yassin	Remark that it is 'haram' to vote for PH candidate for Pulau, declaring that his assertion is 'fatwa' (2 Sep)	Investigated	s233 of CMA 1998, s505b of the Penal Code
57		Remark of Malays losing their special position, with claim that the govt is unable to understand issues faced by Malays (2 Sep)	Investigated	s233 of CMA 1998, s505b of the Penal Code
58	Howard Lee Chuan How	Insulted Islam by quoting verse 59 of Surah an-Nisa of the Quran in his TikTok video	Investigated	s233 of CMA 1998, s505b of the Penal Code
59	Caprice	Video that slandered Ebit Lew	Investigated (19 Sep)	s233 of CMA 1998, s500 of the Penal Code
60	Mondy			

61	Datuk Seri Muhammad Sanusi Md Nor	Statement at a political talk (22 Sep)	Investigated	s4(1) of SA 1948, s233 of CMA 1998, s4A(1) of the Election Offences Act 1954
62	Shahril Azman Abd Halim	Speech related to 3R made in Felda Sungai Kemahal before the Pelangai by-election	Investigated	s233 of CMA 1998, s4(1) of SA 1948, s505(b) of the Penal Code
63	1 individual ( <i>auxiliary policewoman</i> )	Online crude remark about Dato' Seri Anwar Ibrahim	Arrested (28 Sep)	s233 of CMA 1998, s504 of the Penal Code, s14 of the Minor Offences Act 1955
64	Owner of Facebook account 'Muhammad Farhan'	Online insult against the royal institution	Arrested & detained (12–15 Oct)	s233 of CMA 1998, s4(1) of SA 1948
65	Owner of TikTok account @azwanar9	Online insult against the royal institution	Arrested & detained (13–16 Oct)	s233 of CMA 1998, s4(1) of SA 1948
66	Owner of Facebook account 'Nekad Hikers Ventures'	Online threats against Dato' Seri Anwar Ibrahim and Deputy Inspector-General of Police Datuk Ayob Khan Mydin Pitchay	Arrested & detained (27 Oct)	s233 of CMA 1998, s507 of the Penal Code
67	Owner of Facebook account 'Jgad Zruu'			
68	1 individual	Online threats against Education Minister Fadhlina Sidek	Arrested & remanded (3–6 Nov)	s233 of CMA 1998, s507 of the Penal Code
69	Siti Mastura	Statements of Lim Guan Eng being related to four DAP leaders, as well as Tan Sri Lim Kit Siang to Lee Kuan Yew and Chin Peng (5 Nov)	Investigated	s233 of CMA 1998, s505b of the Penal Code
70	Email addresses 'Taktstorer' and 'Takstorer'	Bomb threat emails to 51 international, private and public schools nationwide	Investigated	s233 of CMA 1998, s507 of the Penal Code

71	Datuk Hamid Mohd Amin	Sexual harassment against a 39-year-old woman	Investigated (24 Nov)	s233 of CMA 1998; s292, s507A and s509 of the Penal Code
72	1 individual	Online insult against the Yang Di-Pertuan Agong	Remanded (28–30 Nov)	s233 of CMA 1998, s4(1) of SA 1948
73	Owner of TikTok account @jaiadani89	Uploaded a TikTok video offering a RM5 million reward to assassinate Dato' Seri Anwar Ibrahim and his Cabinet	Detained and remanded (28 Nov – 1 Dec)	s233 of CMA 1998, s507 of the Penal Code
74	Wan Muhammad Azri Wan Deris (Papagomo)	Uploaded a YouTube video implying that Dato' Seri Anwar Ibrahim has AIDS	Investigated	s233 of CMA 1998, s504 of the Penal Code, s14 of the Minor Offences Act 1955
75	2 boys (14 and 17 years old)	Hurled profanities at traffic enforcement personnel after being issued a summons, and uploaded the video respectively (30 Nov)	Arrested (1 Dec)	s233 of CMA 1998, s14 of the Minor Offences Act 1955, s509 of the Penal Code, s64(1) of the Road Transport Act 1987
76	Victor Yong	Statements supporting diplomatic ties between Malaysia and Israel in an interview with an Israeli social media influencer	Arrested and remanded (6–8 Dec)	s233 of CMA 1998, s4(1) of SA 1948, s505(b) of the Penal Code

#### Cases Charged/Convicted Under Section 233 of CMA in 2023

No.	Name of Individual(s)	Allegation/Cause for Investigation	Status	Laws Charged
1	Syed Ahmad Saifullah Hashim	Offensive communications against former Prime Minister Najib Razak and his spouse Rosmah Mansor	DNAA (13 Jan 2023)	s233(1) of CMA 1998

		(between 2 and 4 Apr 2014)		
2	Sim Ngee Thiam	Five charges of initiating offensive text communication (between 22 June and 27 December 2019)	Pleaded not guilty (25 May 2023)	s233(1) of CMA 1998
3	Muhammad Asyraf Ahmad Suhaimi	Offensive images to ex-partner via Telegram (9 Jan 2020)	Pleaded guilty (19 Jan 2023)	s233(1) of CMA 1998
4	Muhaimi Nabil Muatnan	Posting of pornographic video on Telegram (24 Jan 2020)	Pleaded guilty (1 Mar 2023)	s233(1) of CMA 1998
5	Tai Zee Sing	Offensive Facebook post against former Prime Minister Tan Sri Muhyiddin Yassin (March 2020)	Pleaded not guilty (2 Nov 2023)	s233(1) of CMA 1998
6	Muhammad Zakir Ramli	Obscene photos sent via WhatsApp (28 May 2021)	Pleaded not guilty (17 Apr 2023)	s233(1) of CMA 1998
7	Reymi Abdul Rahim	Two charges of offensive communications on Twitter against the Johor Sultan and the royal family (8 Oct 2021)	Pleaded not guilty (10 July 2023)	s233(1) and s233(3) of CMA 1998,
8	Muhammad Firdaus Embong	Four charges of posting insulting text and picture about Islam on Facebook (between 17 March and 18 August 2022)	Pleaded not guilty (29 Mar 2023)	s233(1)(a) of CMA 1998
9	William Khor Wai Loon	Online insults against the Yang di-Pertuan Agong (20 Nov 2022)	Pleaded not guilty (1 Mar 2023)	s233(1)(a) of CMA 1998
10	Muhamad Hafidz Azrul Mat Nizan	Death threats against members of the police via WhatsApp (22 Nov, 3 Dec & 24 Dec 2022)	Pleaded not guilty (17 Jan 2023)	s233(1)(a) of CMA 1998
11	Nor Fadzelli Nor Asmadi	Tweet insulting the Sultan of Johor (25 Nov 2022)	Pleaded not guilty (27 Mar 2023)	s233(1)(a) of CMA 1998

12	Ab Malik Hussain	Two charges of insulting the Yang di-Pertuan Agong in a WhatsApp chat group (22 Nov 2022)	Pleaded not guilty (12 July 2023)	s233(3) of CMA 1998
13	Muhammad Hanis Nordin	Facebook post insulting the Yang di-Pertuan Agong (10 Dec 2022)	Pleaded guilty (27 Feb 2023)	s233(1)(a) of CMA 1998
14	Mohd Masri Md Darus	Tweet insulting the Sultan of Perak (22 December 2022)	Pleaded guilty (26 May 2023)	S233(3) of CMA 1998
15	Ahmad Feisal Mohd Kamil	Facebook post 'A Historical Look at Attitudes of Homosexuality in the Islamic World' (10 Jan 2023)	Pleaded not guilty (21 Nov 2023)	s233(1)(a) of CMA 1998
16	Abdul Rahim Abdullah	Online offensive communications on racial issues (25 Jan 2023)	Pleaded guilty (13 Apr 2023)	s233(1)(a) of CMA 1998
17		Three counts of online offensive communications against the King (2-3 Apr 2023)		
18	Muhammad Indera Mulia Ahmad	Online offensive communications against Sultan of Johor (21 Apr 2023)	Pleaded not guilty	s233(1)(a) & s233(3) of CMA 1998
19	Mohamad Azlan	Online insult against the Sultan of Selangor (28 Aug 2023)	Pleaded guilty (6 Sep 2023)	s233 of CMA 1998, s249 of CMA 1998
20	Aznizan Yusof	Uploaded without consent an ad on the opening of a gold shop by Tengku Bendahara of Kelantan (16 Oct 2023)	Pleaded not guilty (23 Oct 2023)	s233 of CMA 1998
21	Nor Asri Che Husin			
22	Ezuan Hafsham Mohd Hisyam <sup>130</sup>	Used his mother's TikTok account to create and upload a video featuring a woman saying offensive words	Pleaded not guilty (7 Dec 2023)	s233(1)(a) of CMA 1998

<sup>130</sup> Ezuan's mother, Mariyah Yaakob, was charged for making racist remarks against the Malay community under Section 505 of the Penal Code. She pleaded not guilty.

### *Follow-up Developments of the Crackhouse Comedy Club Case*<sup>131</sup>

In July 2022, Rizal van Geyzel (owner of the Crackhouse Comedy Club), Siti Nuramira and her partner Alexander Navin Vijayachandran pleaded not guilty to the respective charges against them. In 2023, all three pleaded guilty. Rizal van Geyzel did so to the first<sup>132</sup> of three charges under Section 233(1)(a) of CMA 1998, as proposed in his third representation accepted by the Attorney-General's Chambers (AGC) and was fined RM8000<sup>133</sup>. Siti Nuramira also submitted a representation letter to the AGC to change her plea from Section 298(A)(1)(a)<sup>134</sup> to Section 298 of the Penal Code<sup>135</sup>, which was also accepted. She was also fined RM8000<sup>136</sup>. Alexander was fined RM16,000 for two counts under Section 233(1)(a) of CMA 1998<sup>137</sup>.

### **Printing Presses and Publications Act 1984**

Section 7 of the Printing Presses and Publications Act (PPPA) 1984 gives the Home Ministry sweeping discretion to ban any publication that is “in any manner prejudicial to or likely to be prejudicial to” public order, morality, security, even public interest and national interest. Arbitrary enforcement of bans is further enabled by the broad definition of publication in the legislation, which includes not just the traditional ones (e.g., books, newspapers etc), but also audio recordings and “anything which by its form, shape or in any manner is capable of suggesting words or ideas”<sup>138</sup>. Having failed to narrowly and specifically define restrictions of expression, PPPA 1984 violates principles of legality and legitimacy, making the legislation incompatible with international human rights law.

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131 Siti Nuramira, as part of her open mic skit at Crackhouse Comedy Club, stripped off her headscarf and baju kurung (although she still had a skirt and top underneath). She was investigated, detained and charged under Section 298A of the Penal Code. Her partner was also charged under Section 233 of CMA 1998. Crackhouse Comedy Club was not spared either (via ban from opening other businesses under their names), with its co-founder Rizal van Geyzel also charged under Section 233 of CMA.

132 Making and initiating the transmission of offensive communications with the intent to offend others via Facebook

133 'Crackhouse owner fined RM8k for posting offensive remarks on FB' (Malaysiakini, 7 July 2023)

<<https://www.malaysiakini.com/news/671195>> accessed 20 November 2023

134 Section 298A(1)(a) of the Penal Code: Whoever by words, either spoken or written, or by signs, or by visible representations, or by any act, activity or conduct, or by organising, promoting or arranging, or assisting in organising, promoting or arranging, any activity, or otherwise in any other manner— (a) causes, or attempts to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill will... on grounds of religion, between persons or groups of persons professing the same or different religions, shall be punished with imprisonment for a term of not less than two years and not more than five years.”

135 Section 298 of the Penal Code: “Whoever, with deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.”

136 Rahmat Khairulrijal, 'Siti Nuramira fined RM8,000 for uttering words to hurt feelings of others' (New Straits Times, 17 April 2023)

<<https://www.nst.com.my/news/crime-courts/2023/04/900402/siti-nuramira-fined-rm8000-uttering-words-hurt-feelings-others>> accessed 20 November 2023

137 'Comedy club case: Siti Nuramira's husband fined RM16,000 for posting offensive video on social media' (The Star, 6 June 2023)

<<https://www.thestar.com.my/news/nation/2023/06/06/comedy-club-case-siti-nuramira039s-husband-fined-rm16000-for-posting-offensive-video-on-social-media>> accessed 20 November 2023

138 Section 2 of PPPA 1984

In 2023, five bans were imposed under Section 7(1) of PPPA 1984, with one of these bans reinstated.

- A watch product and two publications were banned for containing elements of LGBT. A ban was gazetted on 10 August 2023 on all Swatch products containing LGBTQ+ elements, including watches, boxes, wrappers and other relevant materials<sup>139</sup>. This followed a raid by the Home Ministry of 11 Swatch stores in May 2023, which led to the confiscation of 172 Swatch Pride watches. Swatch filed a suit at the Kuala Lumpur High Court to challenge the seizure of these watches. The said two banned publications were *'The Tale of Steven'* and *'Jacob's Room to Choose'*<sup>140</sup>.
- The publication *'Aku'* was banned, due to allegedly 'obscene and immoral content that is against the values of decency in Malaysian society'<sup>141</sup>.
- The publication *'Gay is OK! A Christian perspective'* had its ban reinstated, after the government successfully won its appeal to set aside the 2022 High Court decision. Publisher Chong Ton Shin and author Ngeo Boon Lim were ordered to pay RM15,000 in costs to the Home Ministry and government for High Court and Court of Appeal proceedings<sup>142</sup>. Chong and Ngeo sought leave to appeal to the Federal Court over the reinstated ban, and the leave application is scheduled to be heard on 28 February 2024<sup>143</sup>.

SUARAM also noted two raids on bookstores by the Home Ministry to confiscate publications deemed to be 'immoral' or 'communist'. On 19 August 2023, four officials raided Toko Buku Rakyat owned by local author and educator Benz Ali, and confiscated two publications *'Marx Sang Pendidik Revolusioner'* and *'Koleksi Puisi Masturbasi'*<sup>144</sup>. The authorities took one copy of each publication was taken, citing the PPPA 1984. On 23 November 2023, a team from the Ministry's control and enforcement division seized eight locally published Chinese-language books deemed to contain communist elements during

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139 Tarrence Tan, 'Swatch Pride watches banned, owning one can lead to 3 years' jail' (The Star, 10 August 2023)

<<https://www.thestar.com.my/news/nation/2023/08/10/swatch-pride-watches-banned-owning-one-can-lead-to-3-years039-jail>> accessed 20 November 2023

140 'Home Ministry bans three publications for immorality, LGBT' (The Star, 14 February 2023)

<<https://www.thestar.com.my/news/nation/2023/02/14/home-ministry-bans-three-publications-for-immorality-lgbt>> accessed 20 November 2023

141 Ibid

142 'Home Minister, govt win appeal to reinstate ban on 'Gay is okay' book' (The Star, 25 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/25/home-minister-govt-win-appeal-to-reinstate-ban-on-gay-is-okay-book>> accessed 20 November 2023

143 'Publisher, writer seek leave to appeal to Federal Court over book ban' (The Star, 26 December 2023)

<<https://www.thestar.com.my/news/nation/2023/12/26/publisher-writer-seek-leave-to-appeal-to-federal-court-over-book-ban>> accessed 15 March 2024

144 B Nantha Kumar, 'Home Ministry raids local author's bookstore, seizes books' (Malaysiakini, 18 August 2023)

<<https://www.malaysiakini.com/news/676210>> accessed 20 November 2023

a raid at Gerakbudaya<sup>145</sup>. At least five of the publications were allegedly a series about the history of the Communist Party of Malaya, two were memoirs written by party members, and one of which content was unclear<sup>146</sup>. Across both instances, none of the said publications were on the banned books list.

22,929 sex toys worth an estimated RM1.1 million during a raid of premises in Penang. An investigation paper was opened under Section 7(1) of the PPPA 1984, with the sex toys confiscated and a woman arrested. The said woman pleaded guilty to the charge and was fined RM5000<sup>147</sup>.

## Film Censorship

### *Mentega Terbang - a local film exploring different religions and their conceptions of death and afterlife*

On 10 March 2023, film director Khairi Anwar and screenwriter cum actor Arjun Thanaraju were summoned to Bukit Aman to record statements. The case was investigated under Section 233 of the CMA, as well as Sections 298A and 505(b)<sup>148</sup> of the Penal Code<sup>149</sup>. Four days later, producer Tan Meng Kheng and four other actors including the female lead of the movie were summoned for police questioning. Within the same month, the film was also investigated by the Department of Islamic Development Malaysia (JAKIM), the Malaysian Communications and Multimedia Commission (MCMC) and the National Film Development Corporation Malaysia (FINAS), with FINAS' investigation focused on the licensing and publishing aspect<sup>150</sup>.

A weeks-long online harassment campaign against the cast and crew was instigated by conservative scriptwriter Zabidi Mohamed. The harassment resulted in eight police reports in February 2023, one of which was lodged by political party Putra and another by Persatuan Seniman Malaysia. In turn, this led to investigations by various authorities.

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145 'Home Ministry confiscates eight books suspected of having elements of communism' (The Star, 24 November 2023)

<<https://www.thestar.com.my/news/nation/2023/11/24/home-ministry-confiscates-eight-books-suspected-of-having-elements-of-communism>> accessed 15 March 2024

146 Information obtained from CIVICUS Monitor: <https://monitor.civicus.org/explore/malaysia-bookstores-raided-news-portal-blocked-activists-criminalised-and-sedition-law-used-to-stifle-dissent/>

147 Imram Hilmy, 'Home Ministry seizes RM1.1mil worth of sex toys in Bukit Mertajam' (The Star, 14 March 2023)

<<https://www.thestar.com.my/news/nation/2023/03/14/home-ministry-seizes-rm11mil-worth-of-sex-toys-in-bukit-mertajam>> accessed 20 November 2023

148 Section 298A of the Penal Code - Causing, etc., disharmony, disunity, or feelings of enmity, hatred or ill will or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion.

Section 505b of the Penal Code – Statements conducing to public mischief

149 Joel Shasitiran, 'Cops take statement from 'Mentega Terbang' director, actor' (Free Malaysia Today, 10 March 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/03/10/cops-take-statement-from-mentega-terbang-director-actor/>> accessed 1 March 2024

150 'Up to Finas, MCMC to act on 'Mentega Terbang' film, says Comms Minister' (The Star, 5 March 2023)

<<https://www.thestar.com.my/news/nation/2023/03/05/up-to-finas-mcmc-to-act-on-039mentega-terbang039-film-says-comms-minister>> accessed 1 March 2024

Prior to this, *Mentega Terbang* premiered in 2021 and debuted on Viu, a Hong Kong-based streaming service, two years later.

The film cast and crew were harassed online for weeks. For Khairi and Arjun specifically, the online harassment escalated to offline violence, whereby their cars were vandalised with paint and a corrosive substance, pasted with death threat notes directed against them and their families<sup>151</sup>. Khairi also personally received a death threat text message. Both individuals lodged police reports in response to the incidents. Despite condemnation by the Communications and Digital Minister Fahmi Fadzil of those actions<sup>152</sup>, no action was taken against the perpetrators.

By 1 September 2023, the Home Ministry banned the exhibition, display, distribution, possession, circulation or sale of *Mentega Terbang* under Section 26 of the Film Censorship Act 2002<sup>153</sup>. Three months later, Khairi and Meng Kheng filed an application with the Kuala Lumpur High Court to commence a legal challenge against the ban.

*Tiger Stripes – a local film about a 12-year-old girl's struggles to understand her body as she goes through puberty*

*Tiger Stripes* clinched the top prize at the Cannes Critic Week, with its director Amanda Nell Eu making history as the first Malaysian and Southeast Asian director to win that award<sup>154</sup>. The film even represented Malaysia in the Best International Feature Film Category at the Oscars<sup>155</sup>. Nevertheless, *Tiger Stripes* could not be shown in full as Amanda intended in local cinemas, due to cuts by the Film Censorship Board (LPF). Among scenes cut from the local release that encapsulated the heart of the film include blood on a sanitary pad, a girl trying on her friend's bra over her uniform as they mess around in the school toilets, and the female lead doing a TikTok dance in a waterfall with her hair down<sup>156</sup>.

This case highlights the longstanding threat to artistic freedom and creativity faced by filmmakers locally, due to the repressive legal and regulatory frameworks. Filmmakers are forced to contend with not only LPF's strict and conservative guidelines, but also the requirement that the film must be approved by LPF before being screened – all of which facilitate censorship by authorities of creative content that is critical of the government,

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151 Arif Zikri, 'Mentega Terbang' director and scriptwriter receive death threats, cars splashed with paint, corrosive substance' (Malay Mail, 16 March 2023) <<https://www.malaymail.com/news/showbiz/2023/03/16/mentega-terbang-director-and-scriptwriter-receive-death-threats-cars-splashed-with-paint-corrosive-substance/59946>> accessed 1 March 2024

152 The said source is a tweet: [https://twitter.com/fahmi\\_fadzil/status/1636267259151925248?s=20](https://twitter.com/fahmi_fadzil/status/1636267259151925248?s=20)

153 Kenneth Tee, 'Govt bans 'Mentega Terbang' film and its related publicity materials' (Malay Mail, 13 September 2023) <<https://www.malaymail.com/news/malaysia/2023/09/13/govt-bans-mentega-terbang-film-and-its-related-publicity-materials/90576>> accessed 1 March 2024

154 Kalash Nanda Kumar, 'M'sian film 'Tiger Stripes' wins top prize at Cannes Critics Week' (Malaysiakini, 25 May 2023) <<https://www.malaysiakini.com/news/666358>> accessed 1 March 2024

155 'Tiger Stripes' to represent Malaysia at the Oscars' (Malaysiakini, 5 October 2023) <<https://www.malaysiakini.com/news/681602>> accessed 1 March 2024

156 Rebecca Ratcliffe, 'Tiger Stripes: Malaysia's censors have 'removed the essence' of my film, says director' (The Guardian, 25 November 2023) <<https://www.theguardian.com/world/2023/nov/25/tiger-stripes-malysias-censors-have-removed-the-essence-of-my-film-says-director>> accessed 1 March 2024

sexually explicit, or ‘controversial’ including from the lens of religion. At the same time, the Home Minister can override without question LPF’s decisions. The decision of either authority cannot be challenged in court, thus depriving filmmakers of right to access justice.

*Maryam Pagi Ke Malam – a local film about a 50-year-old woman who wishes to marry her younger partner but faces opposition from her father*

Although having premiered at the International Film Festival Rotterdam 2023 as the sole Malaysian representative<sup>157</sup>, *Maryam Pagi Ke Malam* was not immune to restrictions in screening, even in private. In September 2023, a screening in a privately-run film festival in Kelantan by Persatuan Hokkien Kelantan was cancelled<sup>158</sup>. In October 2023, Sisters in Islam planned to screen the film as part of a private fundraising event in a cinema in Kuala Lumpur. A week before the event, however, officials from the Home Ministry visited the event venue and imposed stringent requirements including unnecessary licenses – thus forcing SIS to cancel the event<sup>159</sup>.

### **Freedom of Expression in Tertiary Educational Institutions**

Freedom of expression by university students continues to be regulated, restricted and even stifled by university administrations, as demonstrated in the following developments.

#### *Concert Guidelines in Universities and Colleges*

On 30 August 2023, the Ministry of Higher Education issued guidelines regulating concerts in universities and colleges. These guidelines significantly impinge on university students’ autonomy to organise entertainment activities, as well as freedom of expression in attire and creative expression. Examples include:

- Students are required to involve university administration in all aspects of the organisation of concerts, including scrutinising song lyrics and genres so as to not affect local sensitivities.
- There are restrictions on how concerts are to be run. Examples include the prohibition of mosh pits, artistes not being allowed to bring audience members on stage, as well as the application of gender segregation to audience seating.
- Audience and artistes are also subjected to restrictive dress codes, such as the prohibition of punk hairstyles and attire that feature Illuminati or pro-LGBT symbols, as well as for male artistes, the prohibition from wearing earrings, bracelets and shorts.

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157 Zarah Morden, ‘With international debut at Rotterdam fest, ‘Maryam Pagi Ke Malam’ hopes for chance on local silver screens’ (Malay Mail, 3 January 2023) <<https://www.malaymail.com/news/malaysia/2023/01/03/with-international-debut-at-rotterdam-fest-maryam-pagi-ke-malam-hopes-for-chance-on-local-silver-screens/48098>> accessed 1 March 2024

158 Hidayah Sani, ‘Didakwa ada mesej tersembunyi, filem Maryam Pagi Ke Malam perlu lalui penapisan LPF’ (The Merdeka Times, 4 September 2023) <<https://themerdekaitimes.com/news/2023/09/didakwa-ada-mesej-tersembunyi-filem-maryam-pagi-ke-malam-perlu-lalui-penapisan-lpf/>> accessed 1 March 2024

159 ‘Sisters in Islam (SIS) Expresses Disappointment Over Cancellation of Women’s Rights Event Amidst Regulatory Scrutiny’ (Sisters in Islam, 18 October 2023) <<https://sistersinislam.org/sisters-in-islam-sis-expresses-disappointment-over-cancellation-of-womens-rights-event-amidst-regulatory-scrutiny/>> accessed 1 March 2024

University student groups such as the Universiti Malaya Association of New Youth (UMANY) and the Universiti Tunku Abdul Rahman Sungai Long Campus' Student Representative Council (SRC), have condemned these guidelines, whilst also arguing that no consultations with them as key stakeholders were undertaken for this policy. The Ministry of Higher Education's response has been reprehensible. Instead of withdrawing the regressive guidelines, the Ministry stated that a review will be undertaken, with the Minister Mohamed Khaled Nordin clarifying that he has not yet approved those guidelines<sup>160</sup>. A few days later, this was followed by the statement that these guidelines serve as reference for universities to develop their own with the involvement of respective student councils or unions<sup>161</sup>. By 16 November 2023, the Ministry sang a different tune, indicating that on-campus concerts must adhere to the government's guidelines<sup>162</sup>. UMAN Y is mounting a judicial review against this policy<sup>163</sup>.

### ***Former Student Activist Found Guilty Over 2019 Convocation Protest***

On 9 October 2023, activist and former UMAN Y president Wong Yan Ke was found guilty under Section 504 of the Penal Code (intentional insult with intent to provoke a breach of the peace) over his one-person protest against the university's former vice-chancellor Abdul Rahim Hashim during his convocation in October 2019. He was fined RM5000 in default three months' jail<sup>164</sup>. Although Wong paid the fine, he would appeal against the decision<sup>165</sup>. This court development ensued from April 2022, when Wong was ordered to enter defence over the protest, as the court ruled that the prosecution succeeded in establishing a prima facie case against him under the said Penal Code provision<sup>166</sup>.

### ***Denial of Entry to Public University for Internship Dialogue***

Muar Member of Parliament Syed Saddiq was denied entry into Universiti Teknologi Mara for a discussion with students on the treatment of interns at the workplace. Upon arrival, the gates were shut, with police officers and auxiliary police standing at the

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160 Muhammad Yusry, 'Higher Education Ministry says will review controversial guidelines for entertainment activities at IPTAs' (Malay Mail, 1 September 2023) <<https://www.malaymail.com/news/malaysia/2023/09/01/higher-education-ministry-says-will-review-controversial-guidelines-for-entertainment-activities-at-iptas/88481>> accessed 20 November 2023

161 '[UPDATED] Concert guidelines for varsities only at recommendation stage: ministry' (The Vibes, 5 September 2023) <<https://www.thevibes.com/articles/education/98497/concert-guidelines-for-varsities-only-at-recommendation-stage-ministry>> accessed 20 November 2023

162 Junaid Ibrahim, Rahimy Rahim & Teh Athira Yusof, 'All on-campus concerts must follow govt guidelines, Dewan Rakyat told' (The Star, 16 November 2023) <<https://www.thestar.com.my/news/nation/2023/11/16/all-on-campus-concerts-must-follow-govt-guidelines-dewan-rakyat-told>> accessed 20 November 2023

163 'Student group crowdfunds to challenge varsity concert rules' (Malaysiakini, 3 September 2023) <<https://www.malaysiakini.com/news/677822>> accessed 20 November 2023

164 Cha Zhi Ting, 'Convocation protest: Court fines ex-UM activist RM5K' (Malaysiakini, 9 October 2023) <<https://www.malaysiakini.com/news/6820130>> accessed 20 November 2023

165 'UM student group: Support warrior who stood up against racism' (Malaysiakini, 5 November 2023) <<https://www.malaysiakini.com/news/683728>> accessed 20 November 2023

166 Raveena Nagotra, 'Ex-Umany president ordered to enter defence over convocation protest' (Malaysiakini, 5 April 2022) <<https://www.malaysiakini.com/news/616993>> accessed 20 November 2023

university entrance<sup>167</sup>. The reason given by the university to cancel the dialogue was to 'maintain campus harmony' and 'focus on spiritual programmes for the Ramadan month'<sup>168</sup>. After several rounds of negotiations, the university agreed to reschedule the dialogue to a later date.

### **Amendments to the University and Universities Colleges Act (UUCA) 1971**

Civil society and university student associations' call for the abolishment of the University and Universities Colleges Act (UUCA) 1971 has been longstanding. UUCA 1971 allows government control and interference of public universities via the political appointment of vice-chancellors. The said vice-chancellors in turn have the authority to appoint deans and members of the Senate, disincentivising merit-based selections as well as subverting not only academic freedom but also autonomous university governance. Additionally, the university administration has also been given extensive powers to manage student affairs, creating a paternalistic culture that heavily regulates, restricts, and even stifles student autonomy, freedom of expression and freedom of association. In short, as long as UUCA 1971 is retained, it will, both fundamentally and functionally, continue to impinge on university autonomy, academic freedom and student empowerment.

In March 2023, whilst the Higher Education Ministry committed to amending certain UUCA provisions such as Section 15 and engage with stakeholders to improve the legislation<sup>169</sup>, the old narrative of UUCA's 'relevance' in addressing university governance was recycled<sup>170</sup>. Although Prime Minister Dato' Seri Anwar Ibrahim recognised the need to remove 'certain provisions to empower students, academicians and lecturers', his statement that the UUCA is 'comprehensive'<sup>171</sup> is a shocking one, considering his active involvement in the student movement when the UUCA came about. At the time, no clear timeline by which the stakeholder engagements would be conducted was given<sup>172</sup>.

In early April 2023, an in-person townhall session on UUCA was held between the Higher Education Ministry and varsity students, academics, and vice-chancellors. According to

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167 Isabelle Leong, 'UiTM agrees to reschedule internship dialogue: Syed Saddiq' (Malaysiakini, 31 March 2023)

<<https://www.malaysiakini.com/news/660614>> accessed 1 March 2024

168 Renushara, 'Syed Saddiq Has Been Disallowed From Entering UiTM For 'Interns Are Not Free Labour' Talk With Students' (World of Buzz, 30 March 2023) <<https://worldofbuzz.com/syed-saddiq-has-been-disallowed-from-entering-uitm-for-interns-are-not-free-labour-talk-with-students/>> accessed 1 March 2024

169 'Govt reviewing UUCA to allow student participation in politics' (Malaysiakini, 13 March 2023)

<<https://www.malaysiakini.com/news/658450>> accessed 1 March 2024

170 Geraldine Tong, Isabelle Leong and Yasmin Ramlan, 'Replacing UUCA is akin to 'changing skins' - deputy minister' (Malaysiakini, 16 March 2023) <<https://www.malaysiakini.com/news/658896>> accessed 1 March 2024

171 Isabelle Leong, 'PM commits to abolishing some UUCA provisions' (Malaysiakini, 20 March 2023)

<<https://www.malaysiakini.com/news/659258>> accessed 1 March 2024

172 Ng Xiang Yi, 'Harapan MPs, students demand 'clear timeline' on UUCA abolishment' (Malaysiakini, 8 March 2023)

<<https://www.malaysiakini.com/news/657845>> accessed 1 March 2024

students<sup>173</sup> and critics<sup>174</sup>, instead of open discussions and genuine efforts by the Ministry to hear out sentiments by affected stakeholders, the townhall session was merely a platform for the Ministry to reinforce and educate those who disagree with the government's perspective that amending and not abolishing UUCA is the best way forward. At the same time, the issue of government-appointed vice-chancellors was not at all discussed. Infantilisation of university students was also evident, when their questions were deflected or unanswered, and when responded to by the Ministry, in polite condescension.

UUCA amendments were tabled in Parliament for first reading on 27 November 2023, eliciting renewed calls of abolishment from student groups. Despite Student Representative Councils or student bodies being allowed to collect or receive money for activities, they are still subject to regulation by the university Board. Other amendments further limit student autonomy. One is the membership of the Deputy Vice-Chancellor and Board-appointed university employees within the Student Disciplinary Committee, at the same time pin-drop silence on the inclusion of student representatives within the committee. This facilitates a biased decision-making process for disciplinary action that may not account for the voices and needs of students. The other proposes discretion being given to the Board to reduce or extend student representative council memberships. This is concerning, as it opens doors to arbitrary decision-making on the basis of personal preferences or other factors that can compromise the best interests of the student body.

## **Recommendations**

Addressing key gaps and developments covered in the chapter, SUARAM calls for:

- Amend or repeal the Sedition Act 1948, Section 233 of the Communications and Multimedia Act 1998 and Printing Presses and Publications Act 1984, with inclusive consultations conducted with civil society as soon as possible. A moratorium should be imposed pending amendments or repeal to the aforementioned laws;
- Abolish the University and Universities Colleges Act 1971, and recommence the work of the 2018 Committee on UUCA Abolition on a comprehensive Higher Education Act;
- Abolish the mandatory requirement under the Film Censorship Act (2002) for ALL films to be assessed and approved by LPF PRIOR to its release.

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173 Raveena Nagotra and Nabila Shila, 'Higher education town hall: Students disappointed by 'no-answer' replies' (Malaysiakini, 7 April 2023) <<https://www.malaysiakini.com/news/661319>> accessed 1 March 2024

174 Sharifah Munirah Alatas, 'COMMENT | Town halls for open discussions, not 'talk down' sessions' (Malaysiakini, 7 April 2023) <<https://www.malaysiakini.com/columns/661386>> accessed 1 March 2024



FREEDOM  
OF  
ASSEMBLY

# FREEDOM OF ASSEMBLY

## SUARAM

Despite the change in administration, the longstanding practice of investigating organisers and/or participants for organising and/or participating in public assemblies prevails, especially under Section 9(5)<sup>175</sup> of the Peaceful Assembly Act (PAA) 2012. Although not as highly prevalent as in 2022, unwarranted tactics to intimidate organisers and participants before and after public assemblies are still applied, and in the case of some assemblies that are organised by the political opposition or are perceived to jeopardise public morality, disproportionately implemented.

Based on SUARAM’s documentation, investigations, arrests and charges under the PAA 2012 in 2023 have significantly reduced. It is noteworthy that the total number does not include four public assemblies of which no specific number of individuals investigated was disclosed. These four public assemblies comprise the solidarity gathering in March 2023 in support of former prime minister Tan Sri Muhyiddin Yassin who was investigated by the Malaysian Anti-Corruption Commission on the Empowerment of Competent Bumiputera Contractors (JanaWibawa) initiative; a peaceful assembly in solidarity with Palestine in April 2023; the Gerakan Rakyat rally in May 2023; and the hunger strike of family members of SOSMA detainees outside Sungai Buloh Prison in July 2023. Commendably, there were no charges in 2023 under the PAA 2012.

### SUARAM-Documented Investigations/Arrests and Charges Under PAA 2012

Year	No. of Investigations/Arrests	No. of Charges
2019	40	0
2020	23	0
2021	293	0
2022	189	4
2023	91	0

At least six (3.2%) persons investigated are politicians or known members of political parties, with the remaining consisting of a mix of activists and civilians (96.8%). Whilst civil society and activists were still the predominant targets of investigations in 2022, the proportion was lower by 11%, with the gap filled by politicians/political party members.

Section 9(5) of PAA 2012 constituted the predominant provision under which public assemblies were investigated (i.e., 73.3%). In eight public assemblies, other provisions from PAA 2012 and/or other Acts were included or constituted the basis for investigations.

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<sup>175</sup> Section 9(5) of PAA 2012: “A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit”. The said subsection (1) requires organisers to notify the Officer in Charge of the Police District in which the assembly is to be held five days before the date of the assembly.

- Two public assemblies that had children as participants were investigated under Section 4(2)(e) and/or (f)<sup>176</sup> of PAA 2012. The aforementioned sections prohibit children below 15 from participating in public assemblies, with the exception of “religious assemblies, funeral processions, assemblies related to custom and assemblies approved by the Home Minister”. In the case of the three-day hunger strike by family members of SOSMA detainees outside Sungai Buloh prison<sup>177</sup>, they were also investigated under Section 31<sup>178</sup> of the Child Act 2001.
- Section 4(2)(b)<sup>179</sup> of PAA 2012 was used in investigations against the Save Malaysia rally organised by Perikatan Nasional (PN) youth. The crowd first gathered at the Masjid Jamek Kampung Baru for prayers, before marching to the Sogo shopping complex where speeches were delivered<sup>180</sup>. And yet, the same provision was not invoked in two rallies outside Shah Alam and the Federal Territory mosques respectively. The rally outside Shah Alam Mosque was to protest the government’s move to withdraw its appeal in the Jill Ireland case and defend Muslims’ “exclusive rights to use the word ‘Allah’”<sup>181</sup>. The protest outside Federal Territory Mosque, on the other hand, consisted of more than UMNO members calling for a royal pardon for former Prime Minister Najib Razak<sup>182</sup>. Based on media reporting, it is noteworthy that the police’s responses towards participants across both rallies were disparate. Whilst the police approached speakers to stop the gathering outside the Shah Alam Mosque with speakers needing to negotiate for extension, such attempts were not seen in the gathering outside the Federal Territory Mosque. Interestingly, the Selangor Sultan’s decree against gatherings being held at or nearby mosques<sup>183</sup> was quoted by the police as a basis to halt the gathering, instead of Section 4(2)(b) of PAA 2012.

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176 Sections 4(2)(e) and (f) of PAA 2012: “A person commits an offence if (e) being a child, he participates in an assembly other than an assembly specified in the Second Schedule; or (f) he recruits or brings a child to an assembly or allows a child to attend an assembly other than an assembly specified in the Second Schedule”. As per the Second Schedule, a child is only allowed to participate in religious assemblies, funeral processions, assemblies related to custom and assemblies approved by the Home Minister.

177 ‘Cops probe hunger strike by families of Sosma detainees’ (Free Malaysia Today, 2 August 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/08/02/cops-probe-hunger-strike-by-families-of-sosma-detainees/>> accessed 20 November 2023

178 Section 31 of the Child Act 2001 pertains to ill-treatment, neglect, abandonment or exposure of children. Refer to page 42:

<https://antislaverylaw.ac.uk/wp-content/uploads/2019/08/Malaysia-Child-Act-1.pdf>

179 Section 4(2)(b) of PAA 2012: “A person commits an offence if (b) he organises or participates in an assembly held at any prohibited place and within fifty metres from the limit of the prohibited place”. Places of worship are among the prohibited places of assembly listed in the First Schedule of PAA 2012.

180 Zunaira Saieed, ‘Protest rally held in Kuala Lumpur over charges against Zahid being dropped’ (The Straits Times, 16 September 2023) <<https://www.straitstimes.com/asia/se-asia/protest-rally-in-kuala-lumpur-over-charges-being-dropped-against-zahid>> accessed 20 November 2023

181 ‘Malay-Muslim groups gather at S'gor mosque to protest ‘Allah appeal’ (Malaysiakini, 19 May 2023)

<<https://www.malaysiakini.com/news/665711>> accessed 20 November 2023

182 ‘Over 2k Umno members gather outside mosque, seek pardon for Najib’ (Malaysiakini, 21 October 2023)

<<https://www.malaysiakini.com/news/683685>> accessed 20 November 2023

183 On 22 July 2023, the Selangor Islamic Religious Department (JAIS) directed all mosques and suraus in the state to ban any form of political activities or programmes within the perimeters of such places of worship, including the putting up of political party banners, slogans or logos.

- Three public assemblies were investigated under Section 14<sup>184</sup> of the Minor Offences Act 1955. The Women’s March and a rally in solidarity with the LGBT community were among these assemblies, with the participants’ placard content (that were based on human rights issues such as gender-based violence and discrimination) as the basis for investigations under the said provision – e.g., “Police your behaviour not my body”<sup>185</sup>, “Imagine if men are as disgusted with rape as with periods” and “Gay people are not criminals, being gay is not a crime”<sup>186</sup>.
- Section 186<sup>187</sup> of the Penal Code was also used to investigate three public assemblies – the rally in solidarity with the LGBT community, the memorandum submission by farmers and activists outside Parliament<sup>188</sup> and a protest against the eviction of farmers in Kanthan, Perak<sup>189</sup>.
- Section 4(1)(a)<sup>190</sup> of the Sedition Act 1948 was used in investigations against Himpit 2023. The said gathering held in February 2023 entailed a parade in which participants marched carrying replicas of medieval weapons such as swords and spears<sup>191</sup>.
- A male civilian, on top of Section 9(5) of PAA 2012, was also investigated under Section 500 of the Penal Code and Section 233 of the Communications and Multimedia Act 1998. He allegedly defamed the government outside Jalan Duta Court using a loudspeaker<sup>192</sup>.

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184 Section 14 of the Minor Offences Act 1955: “Any person who uses any indecent, threatening, abusive or insulting words, or behaves in a threatening or insulting manner, or posts up or affixes or exhibits any indecent, threatening, abusive or insulting written paper or drawing with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned, shall be liable to a fine not exceeding one hundred ringgit.”

185 ‘Women’s march organiser slams cops for probe against rally’ (Malaysiakini, 13 March 2023)  
<<https://www.malaysiakini.com/news/658429>> accessed 20 November 2023

186 Chantelle Billson, ‘Malaysian official brands LGBTQ+ people ‘perverted’ after eight protestors detained’ (PinkNews, 4 August 2023) <<https://www.thepinknews.com/2023/08/04/malaysian-official-brands-lgbtq-people-perverted-after-eight-protestors-detained/>> accessed 20 November 2023

187 Section 186 of the Penal Code: “Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment for a term which may extend to \*two years or with fine which may extend to \*ten thousand ringgit or with both.”

188 ‘Cops probe Perak farmers’ march to Parliament’ (Free Malaysia Today, 12 September 2023)  
<<https://www.freemalaysiatoday.com/category/nation/2023/09/12/cops-probe-perak-farmers-march-to-parliament/>> accessed 20 November 2023

189 ‘PSM chief, three others arrested in Tambun farmers’ eviction row’ (Malaysiakini, 24 October 2023)  
<<https://www.malaysiakini.com/news/684007>> accessed 20 November 2023

190 Section 4(1)(a) of the Sedition Act 1948: “Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency... shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years...”

191 ‘T’ganu Harapan lodges police report over PAS’ Himpit event’ (Malaysiakini, 20 February 2023)  
<<https://www.malaysiakini.com/news/655745>> accessed 20 November 2023

192 Hafidzul Hilmi Mohd Noor, ‘Polis siasat ucapan lelaki hina PM’ (Berita Harian, 11 March 2023)  
<<https://www.bharian.com.my/berita/nasional/2023/03/1075688/polis-siasat-ucapan-lelaki-hina-pm>> accessed 20 November 2023

It is noteworthy that the Women’s March and rally in solidarity with the LGBT community also entailed (alleged) investigations by the Federal Territories Islamic Department (JAWI). In response to the Women’s March, the Minister in the Prime Minister’s Department (Religious Affairs) Mohd Na’im Mokhtar stated that instructions were given to the Department to assist with the police probe<sup>193</sup>. To the latter rally, on the other hand, statements were obtained from several individuals participating in the rally, with the spokesperson also indicating that legal action and punishment can be taken under the Syariah Criminal Offences (Federal Territories) Act 1997 against any “offences related to beliefs...if proven guilty”<sup>194</sup>.

#### List of Individuals/Groups Investigated

No.	Name of Individual(s)	Event (Date)	Status	Laws Investigated
1	10 individuals	Protest outside Swedish embassy on Quran burning (27 Jan)	Investigated	s9(5) of PAA 2012
2		Protest outside Dutch embassy on Quran burning (27 Jan)	Investigated	s9(5) of PAA 2012
3	Yusuf Abdul Hadi	Himpit 2023	Investigated	s4(1)(a) of Sedition Act 1948, s14 of Minor Offences Act 1955
4	35 other individuals			
5	Unknown	Solidarity gathering in support of BERSATU President Muhyiddin Yassin (9 Mar)	Investigated	Not mentioned
6	1 individual	One-person protest outside Jalan Duta Court (11 Mar)	Charged	s9(5) of PAA 2012, s500 of the Penal Code, s233 of the Communications and Multimedia Act 1998
7	7 individuals (speakers, organisers, participants)	Women’s March (12 Mar)	Investigated	s9(5) of PAA 2012, s14 of Minor Offences Act 1955

193 ‘Minister instructs Jawi to assist cops on probing women’s march’ (Malaysiakini, 14 March 2023)

<<https://www.malaysiakini.com/news/658580>> accessed 20 November 2023

194 ‘Police arrest 8 pro-LGBT demonstrators’ (Malaysiakini, 31 July 2023) <<https://www.malaysiakini.com/news/673905>> accessed 20 November 2023

8	Unreported number of individuals	Himpunan Solidariti Bersama Palestin (7 April)	Investigated	s9(5) of PAA 2012
9	E. Parameiswary	May Day Labour rally (1 May)	Investigated	s9(5) of PAA 2012
10	Unreported number of individuals	Another Labour Day rally (1 May)	Investigated	s9(5) of PAA 2012
11	Ho Chi Yang	'Vehicle ban' protest in Cameron Highlands (30 June)	Investigated	s9(5) of PAA 2012
12	3 individuals			
13	8 individuals	Rally in support of LGBT persons outside Sogo Complex (29 July)	Arrested, remanded overnight and released on bail	s9(5) of PAA 2012, s186 of the Penal Code, s14 of the Minor Offences Act 1955
14	Unreported number of individuals	Hunger strike by family members of SOSMA detainees outside Sungai Buloh Prison (31 July – 2 Aug)	Investigated	s4(2) & s9(5) of PAA 2012, s31 of Child Act 2001
15	S Arutchelvan	#LawanLapar outside Parliament (12 Sep)	Investigated	s186 of the Penal Code
16	Sih Sook Hwa			
17	Ayman Hareez			
18	Syarul Ema and 15 other individuals	Save Malaysia rally (16 Sep)	Investigated	s4(2)(b), s4(2)(e), s(4)(2)(f), s9(5) of PAA 2012
19	Michael Jeyakumar Devaraj	Protest in Kanthan in response to forced eviction (24 Oct)	Arrested and released on bail	s186 of the Penal Code
20	Karthiges Manickam			
21	Ho Pon Tien			
22	Kesavan Parvathy			
23	Chong Yee Shan			

### Recurring Tactics to Curtail Right to Peaceful Assembly

Intimidation tactics and unwarranted attempts to limit or prohibit assemblies are still applied. SUARAM also observes seemingly selective treatment by the police towards certain public assemblies.

**Post-assembly investigations against organisers and/or participants.** For assemblies that are held yearly, namely the Women’s March and May Day, this is an unwarranted annual affair, as organisers already notify the police about the assembly five days prior and have pre-assembly meetings with them about assembly facilitation. For assemblies that are ‘sensitive’, such as the Save Malaysia rally, an unnecessarily high number of individuals (i.e., 16) were called in to give statements. SUARAM maintains that such investigations not only constitute a waste of police resources that are already limited, but also act to intimidate and disincentivise the public from organising and participating in public assemblies. On the other hand, in the case of Himpunan Madani Kedah 2023 organised by the Secretariats of the Pakatan Harapan coalition’s national and state branches, no investigations were initiated when the notice was given three days before the gathering<sup>195</sup>.

**Unnecessary requirements to ‘get permission’ to assemble in significant public spaces, especially Dataran Merdeka.** Organisers of the Women’s March are still asked to obtain consent from the Kuala Lumpur City Hall (DBKL) to proceed with the rally in Dataran Merdeka, which is unfounded when DBKL is neither the owner nor the occupier of the public space.

**Unwarranted arbitration on organisation and participation of public assemblies.**

- **‘No permit, illegal assembly’ mindset.** Vestiges of this mindset still manifest in statements by the police, which contravene the duty of police to facilitate and not arbitrate on public assemblies. The May Day rally was described by the police as ‘unauthorised/illegal assembly (that was) held in violation of the law’<sup>196</sup>, despite the police having already been notified about the assembly five days in advance. This was coupled with misquoting of the 10-day notification period, which was already shortened to five days in amendments to PAA 2012 made in 2019. The Save Malaysia rally organised by Perikatan Nasional was another example, in which the ‘no permit, no assembly’ narrative was recycled by the current Deputy Inspector-General of Police (DIGP) Datuk Seri Ayob Khan Mydin Pitchay<sup>197</sup>.
- **Pre-rally investigations and warnings.** In the Save Malaysia rally, an investigation was opened against a video calling on individuals to join the demonstration<sup>198</sup>. The PN Youth Chief, Bersatu Youth Chief and Gombak Setia assemblyperson were also summoned for questioning three days before the rally<sup>199</sup>. The DIGP also warned of

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195 Oral Question No. 33, 17 October 2023

196 Kalbana Perimbanayagam, ‘Police to summon organisers of Labour Day rallies’ (New Straits Times, 1 May 2023)

<<https://www.nst.com.my/news/crime-courts/2023/05/904768/police-summon-organisers-labour-day-rallies>> accessed 1 March 2024

197 Manjit Kaur and Zakiah Koya, ‘No permit, no rally, warns Deputy IGP’ (The Star, 122 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/12/no-permit-no-rally-warns-deputy-igp>> accessed 1 March 2024

198 ‘Cops open investigation paper on ‘Save Malaysia’ rally video’ (Malaysiakini, 13 September 2023)

<<https://www.malaysiakini.com/news/679070>> accessed 20 November 2023

199 Cha Zhi Ting, ‘Sept 16 gathering to celebrate Malaysia Day - PN Youth changes tack’ (Malaysiakini, 13 September 2023)

<<https://www.malaysiakini.com/news/679087>> accessed 20 November 2023

stern action against organisers and participants<sup>200</sup>. On the other hand, pre-rally warnings were absent in the case of the Save Syariah rally, even after Kedah PAS Commissioner urged the public to join the protest<sup>201</sup>. The selective treatment is concerning when both rallies allegedly cover 'sensitive' issues. The Save Malaysia rally was organised to protest the discharge not amounting to acquittal (DNAA) granted to Deputy Prime Minister Datuk Seri Ahmad Zahid Hamidi over the 47 charges in his Yayasan Akalbudi trial. The Save Syariah rally took place outside the Palace of Justice to oppose two lawyers' legal bid to nullify 20 provisions under Kelantan's Syariah Criminal Code (I) Enactment 2019.

- ***The police did not allow a public assembly to be held.*** The said public assembly was organised by the Bukit Jelutong Residents Association to protest the proposed clearing of the last green field in Bukit Jelutong for a housing development, and it was supposed to be held on 18 November 2023<sup>202</sup>. Whilst concerns of 'traffic congestion and potential damage to public amenities' should be accounted for, they should not be a basis for law enforcement to disallow members of the public from exercising their fundamental right to peacefully assemble. In fact, the police should be working with the organisers in implementing measures to ensure safety of participants at the designated public assembly venue.<sup>a</sup>

***Arrest and detention.*** Two public assemblies were of significance. On 29 July 2023, eight members of the Ahmadi Religion of Peace and Light for participating in a rally in solidarity with the LGBT community<sup>203</sup>. All said members were remanded for one day before being released on bail. Two months later on 24 October, three activists and one farmer were arrested by the police for attempting to stop the eviction of farmers by the Perak Land and Minerals Office. They were released on police bail on the same day<sup>204</sup>.

***Police barricade.*** This was evident in the #LawanLapar march to Parliament to submit a memorandum on food security to lawmakers. The Parti Sosialis Malaysia deputy chairperson S. Arutchelvan was blocked on all sides by police officers and prevented from continuing the march from the car park to Parliament<sup>205</sup>. A similar tactic, via the use of

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200 Zahratulhayat Mat Arif, 'Police warn of stern action, organisers of PN's 'Selamatkan Malaysia' rally have yet to apply for permit' (New Straits Times, 11 September 2023) <<https://www.nst.com.my/news/crime-courts/2023/09/953889/police-warn-stern-action-organisers-pns-selamatkan-malaysia-rally>> accessed 20 November 2023

201 'Public urged to join Nov 20 protest against court challenge' (Malaysiakini, 15 November 2023) <<https://www.malaysiakini.com/news/686684>> accessed 20 November 2023

202 R Sekaran, 'Mat Taib questions why cops turned down green protest at Bkt Jelutong' (The Star, 16 November 2023) <<https://www.thestar.com.my/news/nation/2023/11/16/mat-taib-questions-why-cops-turned-down-green-protest-at-bkt-jelutong>> accessed 20 November 2023

203 'Police arrest 8 pro-LGBT demonstrators' (Malaysiakini, 31 July 2023) <<https://www.malaysiakini.com/news/673905>> accessed 20 November 2023

204 'PSM activists, farmer released on police bail' (Malaysiakini, 24 October 2023) <<https://www.malaysiakini.com/news/684064>> accessed 20 November 2023

205 Keran Raj, 'PSM blocked from getting to Parliament, but memorandum eventually handed over' (The Rakyat Post, 13 September 2023) <<https://www.therakyatpost.com/news/2023/09/13/psm-blocked-from-getting-to-parliament-but-memorandum-eventually-handed-over/>> accessed 20 November 2023

plastic barricades and human chains of police officers, was used in the 500-lawyer Walk for Judicial Independence more than a year ago on 17 June 2022.

### State Intimidation and Reprisal

#### Protest to Eviction of Farmers

On 24 October 2023, the authorities not only conducted four arbitrary arrests, but also used force against an activist in a forced eviction by the Perak state government of six farmers in Kanthan. Dozens of officials from the Perak State Land and Minerals Office (PTG), alongside bulldozers and excavators, were mobilised for the forced eviction. The forced eviction took place less than a week after the issuance of eviction notices to the said six farmers that only gave them a week's notice to vacate<sup>206</sup>. It is noteworthy that since 2012, these farmers were promised 30-year lease agreements by the Perak State Development Board, but this promise was not upheld. The forced eviction will threaten livelihoods of 2000 farmers in the area.

- Parti Sosialis Malaysia (PSM) activist Chong Yee Shan was allegedly shoved by an officer from the Perak Land and Mines Office (PTG), upon attempting to stop the bulldozers and excavators from entering the area<sup>207</sup>. At the time of the incident, some of her teeth had shifted and were broken, and Chong also had a fractured cheekbone and abrasions on various parts of her body. Upon lodging a police report on this incident, she was arrested under Section 186 of the Penal Code instead and subsequently released on police bail<sup>208</sup>.
- Three PSM activists – Dr. Michael Jeyakumar, R Karthiges and P Kesavan - and one farmer Ho Pon Tien were arrested on the day of the protest for trying to stop the eviction under Section 186 of the Penal Code. At 8.00pm, the four arrested individuals were released on police bail after having given their statements<sup>209</sup>.

In Chong's case, whilst 45 reports were lodged against the PTG officer for excessive use of force, the said perpetrator was vindicated. Chong was instead charged under the said Penal Code provision and summoned to the Ipoh Magistrate's Court on 27 December 2023<sup>210</sup>. The charge carries a jail term of two years, a fine of up to RM10,000, or both.

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206 Peter Boyle, 'Malaysia: Former socialist MP arrested defending small farmers facing eviction' (Green Left, 1 November 2023) <<https://www.greenleft.org.au/content/malaysia-former-socialist-mp-arrested-defending-small-farmers-facing-eviction>> accessed 20 November 2023

207 'PSM activist left with bloodied face in commotion over farmers' eviction' (Malaysiakini, 24 October 2023) <<https://www.malaysiakini.com/news/683979>> accessed 1 March 2024

208 Wang Ping, 'Activist lodges report against brutality, gets arrested instead' (Malaysiakini, 25 October 2023) <<https://www.malaysiakini.com/news/684206>> accessed 1 March 2024

209 'PSM chairman Dr Michael Jeyakumar, 3 others detained by cops in Kanthan forced land eviction stand-off' (Focus Malaysia, 24 October 2023) <<https://focusmalaysia.my/psm-chairman-dr-michael-jeyakumar-3-others-detained-by-cops-in-kanthan-forced-land-eviction-stand-off/>> accessed 20 November 2023

210 'PSM member injured during farmers eviction to be charged' (Malaysiakini, 22 December 2023) <<https://www.malaysiakini.com/news/690918>> accessed 1 March 2024

Shortly after the protest, the affected six farmers filed a legal challenge, naming the Kinta district and land office administrator, the Perak State Development Corporation, the state land and mines director and the state government as respondents<sup>211</sup>. The farmers contended that the land has been farmed by their ancestors since the 1940s. On 26 October 2023, the Ipoh High Court allowed the application for an interim stay of the eviction order<sup>212</sup>. The hearing is scheduled to take place in March 2024.

The day after the High Court decision, the Perak Menteri Besar's office denied the forced eviction, claiming that attempts were made by the state government to resolve the 11-year-old issue, by providing the alternative site in Changkat Kinding. The office also argued that a visit to the site with the farmers was done in 2021, but only a few of the farmers accepted the offer. PSM activist Dr. Jeyakumar disputed these claims. He cited unlawful use of Section 425 of the National Land Code which should only be applied in situations of trespassers who do not have permission to use government land, hence not to the farmers who has been farming the land since the 1940s under the permission of past governments, both colonial and Malaysian. Whilst the site visit was done, farmers did not accept the offer due to land conditions that were uncondusive for farming. These objections were in fact highlighted by these farmers alongside a request for further discussion, but this request was not taken up by PTG.

In February 2024, the Perak State Development Corporation (PKNP) dragged Dr. Jeyakumar to court over alleged defamation on the eviction. The civil action is in response to Dr. Jeyakumar's statement in a press conference in November 2023 that allegedly implied that the statutory body contravened the interim court order<sup>213</sup>.

### What About the Public Assemblies in Solidarity with Palestine?

In 2023, at least 15 peaceful assemblies were organised in solidarity with Israeli occupation of and atrocities against Palestine. Except for three public assemblies, all others were organised or participated by politicians/members of political parties including youth wings.

Assembly Name (Organiser)	Assembly Date	Location	Approx. No. of Participants
Himpunan Solidariti Bersama Palestin (UMNO Youth)	7 Apr	In front of Masjid Jamek, Kuala Lumpur	40
Solidarity rally (Sekretariat Palestine Malaysia)	20 Oct	March from Jalan Tun Razak to the	1500

211 'Perak farmers want govt to intervene in land eviction issue' (Malaysiakini, 11 December 2023)

<<https://www.malaysiakini.com/news/689643>> accessed 1 March 2024

212 Hidir Reduan Abdul Rashid, 'Ipoh court issues interim stay over eviction of 6 Kanthan farmers' (Malaysiakini, 26 October 2023)

<<https://www.malaysiakini.com/news/684319>> accessed 1 March 2024

213 Hidir Reduan Abdul Rashid, 'Perak State Development Corp sues Jeyakumar for defamation' (Malaysiakini, 7 February 2024)

<<https://www.malaysiakini.com/news/695527>> accessed 1 March 2024

		US Embassy, Kuala Lumpur	
Freedom for Palestine (Viva Palestine and Humanitarian Care Malaysia Bhd)	22 Oct	Dataran Merdeka, Kuala Lumpur	thousands
Malaysia with Palestine (Malaysian Islamic Youth Movement (ABIM), Global Peace Malaysia)	24 Oct	Axiata Arena Stadium, Kuala Lumpur	15,000
10K Solidarity with Palestine (Pan-Malaysian Islamic Party (PAS))	28 Oct	March from the Asy-Syakrin mosque to the US Embassy, Kuala Lumpur	5000
Pahang For Palestine	28 Oct	Dataran Majlis Bandaraya Kuantan, Pahang	6000
Humanitarian Gathering for Palestine	28 Oct	Wisma Muis, Sabah	10,000
Sarawak Solidarity Gathering	28 Oct	Sarawak Sports Complex, Sarawak	2500
Palestine Solidarity convoy (Ipoh Barat UMNO Youth)	28/29 Oct	150km in Perak stopping by Tapah, Cameron Highlands and Simpang Pulai	40 motorcycles
Palestine Solidarity convoy	28/29 Oct	40km from the stadium to Bagan Pinang beach in Port Dickson, Negeri Sembilan	200
Peaceful gathering (three Pertubuhan Kebajikan Anak Yatim Malaysia educational institutions)	28/29 Oct	UCB Theatre Hall in Putera Jaya, Terengganu	200
Palestinian Defenders' Mega Road Tour gathering (Yayasan Dunia Melayu Dunia Islam (DMDI))	29 Oct	Hang Jebat Stadium, Melaka	5000
White Coat Rally (Malaysian Women's Coalition for Al Quds and Palestine)	16 Nov	The Embassy of Egypt, Kuala Lumpur	30

Rally in solidarity with violence against journalists covering the Israeli occupation of and atrocities against Palestine (Save Press 4 Gaza)	18 Nov	Dataran Merdeka, Kuala Lumpur	150
Aksi Bertindak: Kepung Demi Palestin (Sekretariat Solidariti Palestin)	26-31 Dec	Along Jalan Ampang near the US Embassy	200

Actions by the government and law enforcement have largely been commendable. Home Minister Saifuddin Nasution encouraged the public to participate in rallies to stand in solidarity with Palestinians<sup>214</sup>. The police facilitated all major pro-Palestine assemblies held in October and the six-day Kepung Demi Palestin rally, ensuring participant safety throughout the assembly. Nevertheless, for public assemblies held within the vicinity of the Embassy of the United States, barricades approximately a couple of hundred metres from the main gate were set up<sup>215</sup>. Though the need to ensure the safety of foreign representatives in Malaysia deserves recognition, keeping assembly participants a distance of hundreds of metres from the main embassy gates is not conducive especially for assemblies that involve memorandum submissions to embassy representatives. In these situations, given the non-violent nature of the assemblies and adequate resources mobilised by the police for assembly facilitation, restrictions should only be applied if necessary.

In the six-day Kepung Demi Palestin rally, organisers had to negotiate with DBKL officers on the protesters' makeshift 'campsite' at 1.00am on the second day<sup>216</sup>. The said rally constituted a picket around the embassy to symbolise the Israeli occupation of Palestine, in addition to solidarity events every night. The DBKL officers' insistence in dismantling the tents had no basis, considering that the tents were set up along the sides of the road and did not obstruct traffic. By 2.30am, a tent was taken down, with the remaining tents still erected<sup>217</sup>.

Whilst the police have upheld their duty to facilitate the pro-Palestine peaceful assemblies, the reality remains whereby they still have the discretion to use 'compliance' with the five-

214 'Saifuddin: Rallies to support Palestine are encouraged' (The Star, 25 October 2023)

<<https://www.thestar.com.my/news/nation/2023/10/25/saifuddin-rallies-to-support-palestine-are-encouraged>> accessed 20 November 2024

215 In the solidarity rally organised by Sekretariat Palestine Malaysia, for instance, a roadblock 200m away from the Embassy of the United States was set up. Another instance would be the '10K Solidarity with Palestine' rally, whereby the closest participants were allowed to the Embassy was Jalan Tun Razak. As for the Kepung Demi Palestin rally, a barricade using a police truck was set up hundreds of metres away from the Embassy

216 Justin Zack, 'Early morning negotiations between DBKL and Kepung Demi Palestin grind to stalemate' (The Star, 27 December 2023) <<https://www.thestar.com.my/news/nation/2023/12/27/early-morning-negotiations-between-dbkl-and-kepong-demi-palestin-grind-to-stalemate>> accessed 1 March 2024

217 Ibid

day notice period as a basis to 'allow' peaceful assemblies to proceed or not<sup>218</sup>. Considering the recurring tactics to restrict peaceful assemblies as highlighted previously, this arbitrary discretion can be detrimental to the exercise of the right to peacefully assemble, especially spontaneous assemblies in response to urgent issues. Based on SUARAM's media monitoring, post-assembly investigations were initiated against the Himpunan Solidariti Bersama Palestin rally and the six-day Kepung Demi Palestin rally, for 'not receiving any notice'<sup>219</sup> and 'organising an event without a permit'<sup>220</sup> respectively.

### **Court Developments of Past Peaceful Assemblies**

Case management for the Malaysian Bar's (plaintiffs) lawsuit seeking compensation from the police and government (defendants) for preventing the 500-lawyer Walk for Judicial Independence<sup>221</sup> to Parliament on 17 June 2022 was fixed on 12 January 2023. In the lawsuit filed in October 2022, the plaintiffs claimed that the participants were falsely restrained and imprisoned between 10.35am and 11.15am by the defendants, when they were forcibly confined at the Padang Merbok car park within the plastic barricades constructed by police under the direction of the officer-in-charge of the Dang Wangi police district<sup>222</sup>. This was argued to have deprived the participants of their rights under Articles 5, 8, 9 and 10 of the Federal Constitution. In addition, the plaintiffs contended that the defendants contravened their rights under PAA and breached statutory duties under the Peaceful Assembly Act 2012<sup>223</sup>. Two months later in December 2022, the police filed a statement of defence, arguing that false imprisonment is a misstatement, as the plaintiffs were only barred from proceeding to the Parliament building and never prevented from leaving the car park<sup>224</sup>. The police also claimed that the Malaysian Bar was informed beforehand that any procession to Parliament was prohibited and justified their action based on having received objections from a nearby school and Bank Negara Malaysia and the no-procession terms were instructions from higher-ups. The defendants maintained that no arrests were done during the assembly and their actions were lawful.

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218 'Saifuddin: Rallies to support Palestine are encouraged' (The Star, 25 October 2023)

<<https://www.thestar.com.my/news/nation/2023/10/25/saifuddin-rallies-to-support-palestine-are-encouraged>> accessed 20 November 2024

219 Nurul Hidayah Bahaudin, 'Police to summon organiser, participants of flag-burning gathering' (New Straits Times, 8 April 2023)

<<https://www.nst.com.my/news/nation/2023/04/897542/police-summon-organiser-participants-flag-burning-gathering>> accessed 20 November 2023

220 'Police open investigation paper on pro-Palestinian rally' (The Star, 27 December 2023)

<<https://www.thestar.com.my/news/nation/2023/12/27/police-open-investigation-paper-on-pro-palestinian-rally>> accessed 1 March 2024

221 The Walk for Judicial Independence was to raise public awareness of the Malaysian Anti-Corruption Commission's (MACC) investigations against Court of Appeal Judge Mohd Nazlan Mohd Ghazali, who presided over former Prime Minister Najib Razak's SRC International corruption case

222 Hidir Reduan Abdul Rashid, 'Bar seeks compensation from cops for barring march to Parliament' (Malaysiakini, 29 November 2022) <<https://www.malaysiakini.com/news/646082>> accessed 20 November 2023

223 Ibid

224 Hidir Reduan Abdul Rashid, 'Lawyers already told procession to Parliament not allowed – police' (Malaysiakini, 11 January 2023) <<https://www.malaysiakini.com/news/651159>> accessed 20 November 2023

On 7 February 2023, Parti Muda Secretary-General Amir Hariri Abd Hadi filed a preliminary objection to strike out the charge against him under Section 9(1) of PAA 2012 over the 1 August rally held last year on the RM6 billion littoral combat ship scandal<sup>225</sup>. Amir pleaded not guilty to the charge in the Kuala Lumpur Magistrate's Court within the same month in 2022<sup>226</sup>. The court set 20 March 2023 for all parties involved to file their written submissions, with the preliminary objection hearing scheduled to take place a week later.

On another note, the same charge under Section 9(1), albeit in a different rally, against a member of one of the parties within the current ruling government was recently withdrawn. Amanah Youth Chief Hasbie Muda was freed by the Kuala Lumpur Magistrate's Court in April 2023, and the acquittal took place a month after submission of representation<sup>227</sup>. In August 2022, Hasbie was charged alongside two others over their involvement in the Turun Malaysia rally, which was over rising prices of goods<sup>228</sup>. Charges against the two other individuals, Batu PKR Youth chief Muhammad Sabda Suluh Lestari Yahya and International Islamic University Malaysia president Aliff Naif, were dropped in April 2023<sup>229</sup>.

## Recommendations

Reflecting the gaps and developments covered in this chapter, SUARAM calls for:

- Revise law enforcement's internal standard operating procedures on policing public assemblies to be in line with international standards. Such amendments should also include guidelines on the imposition of restrictions that embody principles of necessity and proportionality, as well as guidelines that facilitate the organisation of spontaneous assemblies;
- Improve existing human rights training module in police academies to include best practices in facilitating public assemblies. This should also be accompanied with institutionalised on-the-job training to ensure full sensitisation of the police force of these best practices;
- Amend the PAA 2012 to guarantee without hindrance all individuals, including children and non-citizens, the fundamental right to peacefully assemble in all public spaces;

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225 'Muda sec-gen files application to strike out charge over LCS' (Malaysiakini, 8 February 2023)

<<https://www.malaysiakini.com/news/654366>> accessed 20 November 2023

226 'Muda sec-gen charged over LCS protest' (Malaysiakini, 26 August 2022) <<https://www.malaysiakini.com/news/633523>> accessed 20 November 2023

227 'Cost-of-living rally: PAA charge dropped against Amanah Youth chief' (Malaysiakini, 19 April 2023)

<<https://www.malaysiakini.com/news/662687>> accessed 20 November 2023

228 'Three charged over price hike protest gatherings in KL' (The Star, 18 August 2023)

<<https://www.thestar.com.my/news/nation/2022/08/18/three-charged-over-price-hike-protest-gatherings-in-kl>> accessed 20 November 2023

229 'AGC rejects Muda leader's representations over LCS protest charge' (Free Malaysia Today, 29 January 2024)

<<https://www.freemalaysiatoday.com/category/nation/2024/01/29/agc-rejects-representation-to-strike-out-muda-leaders-charge-over-lcs/>> accessed 1 March 2024

- Amend the PAA 2012 to only restrict the requirement to obtain consent from occupier of place of assembly to privately-owned places;
- Gazette significant public spaces, such as Dataran Merdeka and Parliament, as designated places of assembly. Currently, only Darul Makmur Stadium in Pahang is gazetted under Section 25 of PAA 2012. This gazetting would facilitate the exercise of right to peacefully assembly, by removing the burden on organisers to notify the police by a designated time period.



NATIONAL HUMAN RIGHTS  
COMMISSION OF MALAYSIA  
(SUHAKAM)

# NATIONAL HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

*SUARAM*

## **Amendments to the SUHAKAM Act**

In November 2023, the National Human Rights Commission of Malaysia (Amendment) Act 2023<sup>230</sup> was passed in Parliament, marking a progressive step towards strengthening the national human rights institution (NHRI). Key amendments are as below by theme:

**Access to places of detention.** Section 2(a) of the Amendment Act seeks to amend Section 4 of the National Human Rights Commission of Malaysia (SUHAKAM) Act 1999, providing power to SUHAKAM to visit places of detention, institutions and other places. SUHAKAM is still unable to visit these places of detention and institutions without notice, as access remains subjected to procedures “as may be prescribed by written laws or specified in guidelines”.

**Addressing complaints.** In the SUHAKAM Act, whilst the NHRI can refer human rights complaints to the relevant authority or individual with the necessary recommendations, the latter is not obligated to respond. With the understaffed Complaints and Monitoring Division dealing with a high case load of at least 350 to 500 annually, inadequate responsiveness on the part of the referred party would require time-consuming follow-up, at the same time hampering progress in addressing the complaint. The added provision compelling the relevant authority or individual to inform SUHAKAM of action taken in relation to the complaint thus bridges this gap.

**Children’s Commission.** Contrary to a separate Children’s Commission Bill proposed by the Law and Institutional Reforms Minister Azalina Othman in early 2023, the SUHAKAM (Amendment) Act establishes a Chief Children Commissioner and two Children Commissioners. These three Commissioners are part of the overall SUHAKAM Commissioner lineup. Commendable provisions that empower the Children’s Commissioners to receive and act on direct or indirect complaints from children are included.

**Pluralism Among Commissioners.** Quotas for women (30% of Commissioners) and persons with disabilities (at least one Commissioner) are included in the (Amendment) Act. It is noteworthy that whilst Professor Dato’ Dr. Rahmat bin Mohamad was still chairperson in SUHAKAM, women Commissioners already made up 33.3% of the lineup (four out of ten including the Children’s Commissioner).

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<sup>230</sup> The SUHAKAM Amendment Act 2023 can be found here:

[https://parlimen.gov.my/files/billindex/pdf/2023/DR/DR%2040\\_2023%20-%20BI.pdf](https://parlimen.gov.my/files/billindex/pdf/2023/DR/DR%2040_2023%20-%20BI.pdf)

Whilst having diversity quotas in place is crucial, fulfilment of this quota can be precarious without an appointment process that is broad and transparent. Under the existing SUHAKAM Act, the Yang di-Pertuan Agong appoints Commissioners upon recommendations by the Prime Minister, who will consult the Selection Committee (comprising the Chief Secretary to the Government, SUHAKAM Chairperson and three civil society members). Civil society members in the Selection Committee are nominated by the Prime Minister. This interplay of factors opens up space for political interference. It is noteworthy that information about the Selection Committee members is not made public. Key gaps remain, namely the continued lack of legal requirements for vacancy advertisement, lack of clear and uniform criteria for the Selection Committee to assess applicants, the lack of broad consultation and/or participation in all phases of the selection process, and the lack of legal requirement that candidate recommendations be made from the list determined independently by the Selection Committee.

**Commissioner Involvement in Politics.** Section 3(c)(3B) in the Amendment Act prohibiting appointments of candidates actively involved in politics and registered with political parties is a much-needed measure, especially in light of campaigning by SUHAKAM Commissioner Hasnal Rezua Merican Habib Merican in the Selangor state election in August 2023<sup>231</sup>.

**Code of Conduct and Investigation Tribunal.** In the Amendment Act, the Minister in charge of human rights can establish a code of conduct that would be observed by members of the Commission. Alleged breaches of code of conduct would be referred to the Prime Minister, who would then appoint a three-member panel of the investigation tribunal, who would then conduct investigations including gathering evidence and requiring individuals to attend tribunal meetings. Notable provisions include allowing for suspension of the Commissioner until the tribunal makes its findings, and empowering the tribunal to recommend to the Prime Minister to remove the Commissioner should there be a breach of code of conduct.

#### **SUHAKAM Chairperson's Defamation Suit Against Staff: Abuse of Power**

On 24 May 2023, Professor Dato' Dr. Rahmat bin Mohamad filed a civil defamation suit<sup>232</sup> against then Deputy Secretary Shahizad Sulaiman, following the latter's complaint against him on 10 April under Section 12(1) of the SUHAKAM Act, alleging racial discrimination and abuse of power in a new staff appointment.

The use of external legal mechanisms instead of internal investigations in response to a complaint filed internally implies reprehensible power play and can be construed as a Strategic Lawsuit Against Public Participation (SLAPP) to intimidate, drain financial resources and/or cause stress to Shahizad. At the same time, this lawsuit imposes a climate of fear within the NHRI and can deter near-future whistleblowers with

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231 "No rules barring Suhakam official from becoming candidate" (Malaysiakini, 4 August 2023)

<<https://www.malaysiakini.com/news/674318>> accessed 1 March 2024

232 The defamation suit can be found here (in Malay):

<https://drive.google.com/file/d/1pCwW72dQFP7McBj9XC0IwiHYftW3IS2/view>

legitimate complaints from coming forward, thus putting institutional transparency, accountability and integrity at risk. Moreover, the racial discrimination allegation brings SUHAKAM's human rights mandate into question on various fronts – the Universal Declaration of Human Rights and the embedded principle of non-discrimination on which its work is based, as well as the eradication of racial discrimination to which it committed itself among its work priorities<sup>233</sup> over five years from 2021 to 2025.

Within hours after a press conference and statement by civil society including SUARAM on 16 June<sup>234</sup>, Dr. Rahmat indicated that he would withdraw the suit (having done so on 20 June). In its statement a day later, SUHAKAM stated that an internal investigation would be carried out by an independent body, “ensuring a meticulous, impartial and fair process in accordance with best practices”<sup>235</sup>. By 24 June, it was then revealed that the allegations would be referred to the Prime Minister's Department's Legal Affairs Division “for advice and direction”<sup>236</sup>. Eventually, Dr. Rahmat voluntarily resigned from his position on 31 August 2023.

On 26 January 2023, the Kuala Lumpur High Court found that Dr. Rahmat abused the court process. By filing the defamation suit, Dr. Rahmat was able to invoke Section 12(3) of the SUHAKAM Act to cease internal investigations on the complaint, hence gaining a ‘substantial advantage’ to the prejudice of Shahizad. Furthermore, upon seeking a discontinuance of the suit, Dr. Rahmat did not provide reasons for doing so. On this basis, the court ordered Dr. Rahmat to withdraw his suit with no option of refile in the future. Dr. Rahmat was also ordered to pay costs of RM5000 to Shahizad's counsel.

## SUHAKAM's Annual Reports

The NHRI's 2020 annual report was tabled and debated in Parliament on 25 May 2023, two years later than the required period stipulated in Section 21 of the SUHAKAM Act. Commendably though, the report was debated in Parliament in early June. This was the second time in history, with the first taking place in 2019 with SUHAKAM's 2018 annual report.

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233 Refer to SUHAKAM's 2021-2025 strategic plan: [https://suhakam.org.my/wp-content/uploads/2021/02/Strategic-Plan-e-Booklet\\_V5.pdf](https://suhakam.org.my/wp-content/uploads/2021/02/Strategic-Plan-e-Booklet_V5.pdf)

234 'SUHAKAM chairperson's defamation suit against staff places institution's human rights mandate in jeopardy' (SUARAM, 20 June 2023) <<https://www.suaram.net/post/suhakam-chairperson-s-defamation-suit-against-staff-places-institution-s-human-rights-mandate-and-in>> accessed 1 March 2024

235 'Withdrawal of Defamation Suit to Facilitate Independent Investigation into Allegations / Kenyataan Media SUHAKAM No. 17-2023' (SUHAKAM, 17 June 2023) <[https://suhakam.org.my/2023/06/press-statement-no-17-2023\\_-withdrawal-of-defamation-suit-to-facilitate-independent-investigation-into-allegations-kenyataan-media-suhakam-no-17-2023\\_-penarikan-balik-saman-fitnah-untuk-membantu-si/](https://suhakam.org.my/2023/06/press-statement-no-17-2023_-withdrawal-of-defamation-suit-to-facilitate-independent-investigation-into-allegations-kenyataan-media-suhakam-no-17-2023_-penarikan-balik-saman-fitnah-untuk-membantu-si/)> accessed 1 March 2024

236 'Suhakam to refer complaints against chairperson to Putrajaya' (Malaysiakini, 25 June 2023) <<https://www.malaysiakini.com/news/669832>> accessed 1 March 2024

Neither explanations nor announcements has been issued by SUHAKAM or BHEUU about the timelines by which the 2021, 2022 and 2023 annual reports would be tabled.

### **Recommendations**

- Adopt and implement recommendations by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA) on commissioner appointment process;
- Table the 2021, 2022 and 2023 annual reports as soon as possible.



FREE AND  
FAIR ELECTIONS

# FREE AND FAIR ELECTIONS

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## Six State Elections (PRN6)

On 10 October 2022, the Dewan Rakyat (Parliament's House of Representatives) was dissolved, paving the way for 15th General Election (*Pilihan Raya Umum ke-15*, PRU15) to be held about six weeks later on 19 November. A total of six states, i.e., Kedah, Kelantan, Terengganu, Penang, Selangor and Negeri Sembilan, opted not to dissolve their State Assemblies (*Dewan Undangan Negeri*, DUN) alongside the Dewan Rakyat. Of these six states, Kedah, Kelantan and Terengganu were under Barisan Nasional (BN) and Perikatan Nasional (PN), whilst Selangor, Penang and Negeri Sembilan were under Pakatan Harapan (PH).

Instead, all six states dissolved their DUN on different dates. The earliest states to do so were Kelantan and Selangor on 22 June 2023, with the last being Negeri Sembilan on 1 July 2023. Despite these different DUN dissolution dates, all six state elections (PRN6) ran concurrently on 12 August 2023<sup>237</sup> that involved over 9.7 million voters. Turnout for all six states was 70.73%<sup>238</sup>. The state with the highest voter turnout was Terengganu at 74.79%, whilst Kelantan was the lowest at 60.96%<sup>239</sup>. Nevertheless, the voter turnout in PRN6 has improved, compared to that observed in other state elections held separately over the last three years from PRU15, namely Sabah (66.6%; in 2020), Melaka (65.85%; in 2021), Sarawak (60.67%; in 2021) and Johor (54.92%; in 2022). A voter turnout of 70% is the threshold that election watchdogs such as the Coalition for Clean and Fair Elections (BERSIH) usually use to indicate the legitimacy of the newly formed government after the elections.

With more than 40% of the national voters going to the polls, PRN6 was widely perceived to be a referendum on the "Unity Government" of PH and BN led by Prime Minister Anwar Ibrahim<sup>240</sup>, which would also decide which political party or coalition would lead the respective states over the next five years.

PRN6 is interesting, as it features a three-way contest involving PH-BN, PN, as well as a political alliance between the Malaysian United Democratic Alliance (MUDA) and Parti Sosialis Malaysia (PSM). Despite MUDA's earlier support of the Unity Government, their application to join PH was rejected, and several reforms advocated by PH went unimplemented. Consequently, they opted to independently participate in PRN6. The

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237 Election Commission's press statement Bil 12/2023, 5 July 2023

238 Obtained from Tindak Malaysia's election results analysis: [https://github.com/TindakMalaysia/HISTORICAL-ELECTION-RESULTS/blob/main/2023-PRN6-STATE-ELECTIONS/MALAYSIA\\_PRN6\\_2023\\_ELECTION\\_RESULTS.csv](https://github.com/TindakMalaysia/HISTORICAL-ELECTION-RESULTS/blob/main/2023-PRN6-STATE-ELECTIONS/MALAYSIA_PRN6_2023_ELECTION_RESULTS.csv)

239 Election Commission's press statement Bil 22/2023, 13 August 2023

240 Norshahril Saat, 'Commentary: Malaysia's state elections - when referendum takes precedence over reformasi' (Channel News Asia, 16 August 2023) <<https://www.channelnewsasia.com/commentary/malaysia-state-election-referendum-reformasi-anwar-muhyiddin-ph-bn-pn-3700231>> accessed 1 March 2024

MUDA-PSM alliance is solely aimed at preventing any seat clashes between these political entities<sup>241</sup>.

The PRN6 election outcomes maintain a status quo, with the previously governing parties or coalitions retaining power in the respective states. Kedah, Kelantan, and Terengganu continue to be administered by the Pan-Malaysian Islamic Party (PAS), in collaboration with their PN allies— the Parti Pribumi Bersatu Malaysia (BERSATU) and Parti Gerakan (GERAKAN). Meanwhile, Penang, Selangor, and Negeri Sembilan remain under PH's governance. In Selangor, however, PN successfully garnered 22 seats in PRN6, a significant increase from the one seat in DUN Sijangkang won by PAS previously<sup>242</sup>.

### **By-Elections**

There were several by-elections that took place at the same time as and also after PRN6. These by-elections are held in light of unexpected vacancies such as due to the Election Court's decision nullifying the elected candidate as is the case with the Kuala Terengganu by-election and Kemaman by-election, and deaths of incumbents such as Dato' Salahuddin Ayub, Member of Parliament for Pulau and State Assemblyperson for Simpang Jeram in Johor, as well as Datuk Seri Johari Harun, State Assemblyperson for Pelangai in Pahang. The last by-election took place in Kemaman, where an election petition against the incumbent was accepted by the Election Court.

The trend in by-election results in Kuala Terengganu, Pulau-Simpang Jeram, Pelangai and recently in Kemaman is similar to that observed in PRN6, whereby individual or party incumbents successfully retained their seats. In Kuala Terengganu (previously held by PAS), Kemaman (PN-PAS), Pulau-Simpang Jeram (PH-AMANAH) and Pelangai (BN-UMNO), candidates from the respective political parties or coalitions successfully defended their seats. In Kuala Terengganu, it is noteworthy that the same candidate who vacated the seat due to an election bribery petition under the Election Offences Act 1954 (EOA) contested again and secured victory with a larger majority<sup>243</sup>.

BERSIH released a monitoring report on PRN6 and the series of by-elections that took place in 2023. 324 electoral offences committed by various parties were documented, including the contesting political parties such as PH, BN, PN, MUDA, and PSM. Over 80% of documented offences (i.e., 270) occurred on polling day. The most common offences on polling day were campaign-related, which included buying votes and displaying party banners that respectively violate Sections 26 and 26A of the EOA.

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241 Suraya Ali, 'MUDA tanding PRN enam negeri secara sendirian' (Berita Harian, 26 June 2023)

<<https://www.bharian.com.my/berita/nasional/2023/06/1119259/muda-tanding-prn-enam-negeri-secara-sendirian>> accessed 9 February 2024

242 In the 14th General Election, PAS contested under their own political coalition called Gagasan Sejahtera, while BERSATU contested under Pakatan Harapan

243 Kamaliza Kamaruddin, 'PRK Parlimen Kuala Terengganu: Ahmad Amzad menang majoriti 47,266 undi' (Utusan Malaysia, 13 August 2023) <<https://www.utusan.com.my/nasional/2023/08/prk-parlimen-kuala-terengganu-ahmad-amzad-menang-majoriti-47266-undi/>> accessed 9 February 2024

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### **Election Petition**

An election petition can be filed at the Election Court to challenge election results, in light of election practices that allegedly violate the EOA. The burden of proof is in tandem with criteria set out in Section 32 of the EOA. The election of a candidate will be declared void, if the Election Judge found evidence of extensive prevalence of bribery, corruption, treating or intimidation that they may be “reasonably supposed to have affected” election results; or non-compliance with provisions of any written law relating to the conduct of any election and that such non-compliance affected election results, among others.

After GE15, the following petitions were filed:

1. By Gabungan Rakyat Sabah’s Tuaran candidate Datuk Joniston Bangkuai against member of Parliament (MP) from the Pakatan Harapan coalition (PH), Datuk Seri Madius Tangau, seeking a court order to determine Madius was not duly elected as Tuaran MP during GE15 and that the said election was void. The election petition was struck out<sup>245</sup>.
2. By the Parti Kesejahteraan Demokratik Masyarakat (KDM) president Datuk Peter Anthony against the Tenom Returning Officer for rejecting his nomination papers in GE15. This election petition was struck out by the Election Court in March 2023, with subsequent appeal against the decision also unsuccessful<sup>246</sup>.
3. By PH’s Putatan candidate, Awang Hussaini Ramli, against Datuk Shahelmey Yahaya, who contested under Barisan Nasional (BN) in GE15. The election petition was filed in December 2022, and was dismissed by the Federal Court in August 2023<sup>247</sup>.
4. By United Malays National Organisation’s (UMNO) Gua Musang candidate, Tengku Razaleigh Hamzah, against MP Mohd Azizi Abu Naim from the Perikatan Nasional coalition (PN). This was to challenge the parliamentary constituency’s election

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244 BERSIH, ‘Laporan pemerhatian enam pilihan raya negeri dan pilihan raya-pilihan raya kecil 2023’ (BERSIH, 30 January 2024) <<https://bersih.org/download/laporan-pemerhatian-pilihan-raya-2023/>> accessed 9 February 2024

245 Ersie Anjumun, ‘Joniston’s election petition struck out, Madius remains Tuaran MP’ (New Straits Times, 23 March 2023) <<https://www.nst.com.my/news/crime-courts/2023/03/892106/jonistons-election-petition-struck-out-madius-remains-tuaran-mp>> accessed 7 November 2023

246 Ersie Anjumun, ‘Peter Anthony’s election petition struck out, Riduan Rubin confirmed Tenom MP’ (New Straits Times, 15 March 2023) <<https://www.nst.com.my/news/crime-courts/2023/03/889513/peter-anthonys-election-petition-struck-out-riduan-rubin-confirmed>> accessed 7 November 2023

247 Izwan Abdullah, ‘Shahelmey kekalkan kerusi Parlimen Putatan’ (New Straits Times, 10 March 2023) <<https://www.bharian.com.my/berita/nasional/2023/03/1075073/shahelmey-kekalkan-kerusi-parlimen-putatan>> accessed 7 November 2023

outcomes, allegedly because of money politics. The petition was struck out, as the petitioner fired all his lawyers<sup>248</sup>.

5. By BN's Segamat candidate, Tan Sri M. Ramasamy, against MP R. Yuneswaran under PH, on allegations of treating activities under Section 8 of EOA. The Muar High Court dismissed the petition on 3 April 2023, to which Ramasamy filed an appeal to the Federal Court to send back his Segamat election petition to the Election Court for a full hearing. The Federal Court allowed this appeal<sup>249</sup>. However, Ramasamy then withdrew his election petition on 8 November 2023 and was agreed by all the respondents<sup>250</sup>.
6. By Putrajaya UMNO division vice-chief Datuk Ahmad Faisal Abdul Karim against MP Mohd Radzi Jidin from PN, on alleged corruption during GE15 by Radzi and his agent. The petition was filed in February 2023, to which Radzi filed a preliminary objection in March to strike out the petition. Karim's appeal to remit back the election petition to the High Court for a full hearing was dismissed.
7. By Marang's BN candidate Jasmira Othman against MP Abdul Hadi Awang from PAS on alleged corruption. The petition was rejected by the Election Judge<sup>251</sup>.
8. By Masjid Tanah's BN candidate Abdul Hakim Abdul Wahid against MP Mas Ermeyati, on allegations of bribery and treating activities. The petition was dismissed by the Election Judge<sup>252</sup>.
9. By Kuala Terengganu's BN candidate Mohd Zubir Embong against MP Ahmad Amzad Hashim on allegations of bribery via the i-Student, i-Belia and i-Pencen programmes by the Terengganu state government. The Election Court accepted the petition and annulled Amzad's appointment<sup>253</sup>. A by-election was held concurrently with the Terengganu state election on 12 August 2023, and Amzad retained his victory.
10. By voters in the Kemaman constituency against MP Che Alias Hamid for alleged bribery via the i-Student, i-Belia and i-Pension programmes by the Terengganu state government. The Election Court dismissed the petition. The petitioners filed an appeal at the Federal Court, which was reinstated by the latter on the basis that there

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248 'Mahkamah batal petisyen pilihan raya Gua Musang, Pas terkejut pempetisyen pecat peguam' (Astro Awani, 5 September 2023)  
<<https://www.astroawani.com/berita-politik/mahkamah-batal-petisyen-pilihan-raya-gua-musang-pas-terkejut-pempetisyen-pecat-peguam-435996>> accessed 7 November 2023

249 'Mahkamah Persekutuan benarkan rayuan cabar keputusan pilihan raya Segamat' (Astro Awani, 18 October 2023)  
<<https://www.astroawani.com/berita-malaysia/mahkamah-persekutuan-benarkan-rayuan-cabar-keputusan-pilihan-raya-segamat-433512>> accessed 7 November 2023

250 Sarban Singh, 'MIC treasurer withdraws election petition for Segamat parliamentary seat' (The Star, 8 November 2023)  
<<https://www.thestar.com.my/news/nation/2023/11/08/mic-treasurer-withdraws-election-petition-for-segamat-parliamentary-seat>>  
accessed 15 February 2024

251 Mohd Azli Adlan, 'Mahkamah: Petisyen PRU15 Parlimen Marang ditolak' (Kosmo!, 27 June 2023)  
<<https://www.kosmo.com.my/2023/06/27/mahkamah-petisyen-pru15-parlimen-marang-ditolak/>> accessed 7 November 2023

252 Nor Farhana Yaacob, 'Mas Ermeyati kekal Ahli Parlimen Masjid Tanah' (Sinar Harian, 27 October 2023)  
<<https://www.sinarharian.com.my/article/631688/berita/semasa/mas-ermeyati-kekal-ahli-parlimen-masjid-tanah>> accessed 7  
November 2023

253 'Mahkamah batal kemenangan Ahmad Amzad di kerusi Parlimen Kuala Terengganu' (Berita Harian, 27 June 2023)  
<<https://www.bharian.com.my/berita/nasional/2023/06/1119741/mahkamah-batal-kemenangan-ahmad-amzad-di-kerusi-parlimen-kuala>> accessed 7 November 2023

were issues meriting a full hearing at the Election Court. Hamid's victory was eventually nullified in September 2023, with the Election Court ruling that the petitioners succeeded in proving beyond a reasonable doubt that corruption with the aim of influencing voters in GE15 took place. A by-election was held on 2 December 2023. In the by-election, PAS nominated the current Terengganu Chief Minister, YB Dato' Seri Dr Ahmad Samsuri Mokhtar and he won against BN candidate Tan Sri Raja Mohamed Affandi Raja Mohamed Noor.

### **Issue of Access to Voting**

Due to close proximity in dates of PRU15 and PRN6 in 2023 (i.e., around eight to nine months), there was concern that uncertainties in dates of DUN dissolution and polling might lead to a low voter turnout. In this context, Chief Ministers from the six states met to discuss the respective DUN dissolution dates and came to a consensus that all DUN dissolutions were to take place within the last two weeks of June<sup>254</sup>.

On that basis, several organisations such as BERSIH issued statements opining that the Election Commission (EC) can announce the election dates in advance, based on the deadlines of DUN dissolution for each of the six states, to enable a higher voter turnout<sup>255</sup>. Issuing early announcements of election dates provides more time to all parties to make corresponding preparations or plans for the state elections, especially enforcement authorities such as the EC and the Royal Malaysian Police, as well as the voters.

There is a noticeable drop in the prevalence of postal vote applications in PRN6 compared to PRU15. During PRU15, the EC issued a total of 365,686 postal ballots. A notable postal vote category is 1B, which is for overseas voters. A total of 48,109 category 1B postal ballots were issued in PRU15, marking a 60% increase compared to PRU14.

It is important to note that the increase in the number of category 1B postal voters is due to the EC facilitating the application process by allowing postal voting applications to be made online. This process was continued up to PRN6 and other subsequent by-elections.

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254 Nailah Huda, 'PRN: Enam negeri sepakat bubar DUN dua minggu terakhir Jun' (Astro Awani, 22 February 2023)

<<https://www.astroawani.com/berita-malaysia/prn-enam-negeri-sepakat-bubar-dun-dua-minggu-terakhir-jun-407732>> accessed 7 November 2023

255 Sofia Zahari, 'Announce date of state polls 6 months in advance, says Bersih' (Free Malaysia Today, 23 February 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/02/23/announce-date-of-state-polls-6-months-in-advance-says-bersih/>> accessed 7 November 2023

Category/ Election	GE15	%	PRN6 2023	%	Kuala Terengganu -2023	%
<b>1A</b>	<b>299,097</b>	<b>81.79</b>	<b>87,666</b>	<b>85.89</b>	<b>961</b>	<b>85.27</b>
<b>1B</b>	<b>48,109</b>	<b>13.16</b>	<b>7,972</b>	<b>7.81</b>	<b>77</b>	<b>6.83</b>
<b>1C</b>	<b>15,739</b>	<b>4.3</b>	<b>4,705</b>	<b>4.61</b>	<b>71</b>	<b>6.30</b>
<b>Absentee Voter</b>	<b>2,741</b>	<b>1.69</b>	<b>1,727</b>	<b>1.69</b>	<b>18</b>	<b>1.60</b>
<b>Total</b>	<b>365,686</b>		<b>102,070</b>		<b>1,127</b>	

\*1A: Election workers, EC members/officials, member of Police force, member of Armed forces, Members of media

\*\*1B: Malaysian residing overseas

\*\*\*1C: Any agency/organisation designated by EC  
(Postal Voting Data Source: Danesh Chacko, Tindak Malaysia)

In PRN6, however, only 7,972 category 1B postal ballots were issued, suggesting a lack of commitment on the part of the EC to enhance political participation of overseas voters and a reduced enthusiasm among overseas Malaysians to apply as postal voters. There were complaints from candidates, for example, the candidate for the Subang Jaya DUN (who is also the incumbent) who stated that during GE15, the EC issued 2,850 postal voting papers for the State Assemblies within the Subang Parliament (Subang Jaya and Kinrara), but only 380 postal voting papers were issued for PRN6<sup>256</sup>.

A major issue that needs to be discussed is how the EC carries out its responsibility to return the postal votes. Out of the 7,972 postal votes issued in PRN6, 3,495 (43.8%) category

256 BERSIH, 'Laporan pemerhatian enam pilihan raya negeri dan pilihan raya-pilihan raya kecil 2023' (BERSIH, 30 January 2024)

<<https://bersih.org/download/laporan-pemerhatian-pilihan-raya-2023/>> accessed 6 March 2024

1B postal votes were successfully returned by the non-governmental organisation Vote Malaysia and Malaysian Student Councils of Australia (MASCA). MASCA managed to return 519 postal votes. This is almost half of the category 1B postal votes issued by the EC in PRN6<sup>257</sup>.

Due to the high costs to return the postal ballots, along with various issues highlighted by election monitoring bodies such as Bersih and Global Bersih such as late receipt of postal votes by overseas postal voters who are subsequently unable to return them, voter confidence in this postal voting system is affected. Mechanisms to address this issue, proposed by Bersih and Global Bersih<sup>258</sup>, include extending the election campaign period to 21 days or allowing postal voters to print and mail their own ballots with a more robust verification mechanism, both of which can be implemented by the EC.

### Misuse of MyKad for Voting

Parliament approved automatic voter registration alongside the constitutional amendment on the lowering of voting age to 18 years old in 2019, with the former subsequently being gazetted for implementation on 15 December 2021<sup>259</sup>. Prior to the implementation of automatic voter registration, Malaysian citizens who were old enough to vote had to complete the application forms and submit them to the Election Commission (EC), with voter registration results released by the EC once every three months. Now, however, Malaysians who are 18 years old will automatically be registered as voters by the EC, based on information obtained from the National Registration Department (NRD). In GE15, election monitoring bodies such as BERSIH only found three cases<sup>260</sup> in which voters were unable to vote as their names were not within the voter registration list<sup>261</sup>.

The Royal Malaysian Police (RMP), on the other hand, reported receiving as many as 94 complaints regarding misuse of MyKad by other parties to vote<sup>262</sup>. This development is very concerning, as it deprives affected persons of their right to vote and participate in democracy. This misconduct is an offence under Section 7(1) of the Election Offences Act 1954. To date, the police have not provided updates on investigation outcomes.

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257 Nor Farhana Yaacob, 'Mas Ermeyati kekal Ahli Parlimen Masjid Tanah' (Sinar Harian, 27 October 2023)

<<https://www.sinarharian.com.my/article/631688/berita/semasa/mas-ermeyati-kekal-ahli-parlimen-masjid-tanah>> accessed 7 November 2023

258 BERSIH and Global Bersih, 'Evaluation of Postal Voting for Johor 2022 for Overseas Voters',

<<https://bersih.org/download/evaluation-of-postal-voting-for-johor-2022-for-overseas-voters/>> accessed 6 March 2024

259 'Undi18: Pendaftaran automatik berkuat kuasa 15 Disember' (Astro Awani, 2 December 2021)

<<https://www.astroawani.com/berita-malaysia/undi18-pendaftaran-automatik-berkuat-kuasa-15-disember-333981>> accessed 7 November 2023

260 Election Observation Report on the 15th Malaysian General Election, The Coalition on Free and Fair Elections (BERSIH)

<<https://bersih.org/download/ge15-observation-report/>>

261 Police in the state of Penang received 33 reports, whilst police in the state of Melaka received 5 reports on misuse of voters' MyKad to vote.

262 'Polis terima 94 laporan guna Mykad orang lain untuk mengundi' (Malaysiakini, 13 August 2023)

<<https://www.malaysiakini.com/news/675536>> accessed 7 November 2023

## Misuse of Government Resources

Across the 6PRN and by-elections, instances of abuse of the federal government's (non-caretaker government) powers to influence voters were observed during the election period. The Deputy Prime Minister Datuk Seri Zahid Hamidi's announcement on the RM500,000 allocation to several youth organisations in Terengganu<sup>263</sup> during the Kuala Terengganu by-election period is an example of this. It is clearly implied in his announcement that the allocation will be given if a ruling party of the unity government is elected as the state government. Another prominent example is the announcement by the current Deputy Education Minister Lim Hui Ying on providing additional funding of over RM110,000 to three vernacular schools (SJK) during the Pelangai by-election period<sup>264</sup>.

This is perpetuated by the lack of strong legal frameworks to define and circumscribe powers of caretaker and non-caretaker governments during the election period. Only one guideline limiting powers of caretaker governments has been issued thus far in 2021 whilst the eighth Prime Minister, Tan Sri Muhyiddin Yassin, was in power<sup>265</sup>. Election monitoring bodies such as BERSIH, on the other hand, has issued recommendations to limit the powers of the non-caretaker government via prohibition of the 3Cs (no condition, no campaign and no candidate)<sup>266</sup>.

Misuse of government resources can be categorised into two types: undue influence and grants from the government, and improper utilisation of government assets. These practices for political campaigning are not limited to any specific party, occurring at both federal and state government levels. In the PRN6 and by-elections, for instance, PH and PN topped the highest number of cases in misuse of government resources, totalling 12 instances (7 PH and 5 BN) for undue government influence and grants, and 8 instances (7 PH and 1 BN) for the misuse of government assets for campaigning. Offences related to undue government influence and bribery can be deemed as violations under Sections 9 and 10 of the EOA. These offences have formed the basis for the filing of election petitions, such as in the Kuala Terengganu and Kemaman by-elections.

It is crucial to note that the utilisation of government resources in elections contradicts the principles of free and fair elections as outlined in internationally recognised declarations,

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263 'Peruntukan RM250,000 kepada Majlis Belia Negeri Terenggan' (Astro Awani, 28 July 2023)

<<https://www.astroawani.com/videos/video-terkini-x7sio1/peruntukan-rm250000-kepada-majlis-belia-negeri-terengganu-x8mucjw>> accessed 7 November 2023

264 'Three schools get additional allocation for upgrading work' (The Star, 22 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/22/three-schools-get-additional-allocation-for-upgrading-work>> accessed 7 November 2023

265 'Kenyataan media: Fungsi dan peranan kerajaan caretaker' <[https://ksn.gov.my/images/pdf/KERAJAAN\\_CARETAKER.pdf](https://ksn.gov.my/images/pdf/KERAJAAN_CARETAKER.pdf)> accessed 7 November 2023

266 'Tanpa Syarat, Tanpa Kempen, Tanpa Calon: Panduan Mencegah Salah Guna Kelebihan Penyandang Untuk Kempen Pilihan Raya' (BERSIH, 20 July 2023) <<https://bersih.org/2023/07/20/panduan-mencegah-salah-guna-kelebihan-penyandang-untuk-kempen-pilihan-roya/>> accessed 7 November 2023

such as Article 11(1)<sup>267</sup> of the Bangkok Declaration and Article 4(1)<sup>268</sup> of the Inter-Parliamentary Union’s Declaration on Criteria for Free and Fair Elections.

### **The Power of the Election Commission (EC) and Modernising Electoral Laws**

BERSIH’s monitoring of the electoral process in six states and the series of by-elections reveals a notable lack of authority and capacity within the EC to enforce various provisions related to election offences. The prevalence of offences, particularly on polling day, and the misuse of government resources underscore deficiencies in the legal framework designed to ensure that elections are conducted freely and fairly. This highlights a need for a more robust and modernised electoral law to address these challenges effectively.

### **Commendable Parliamentary Reform: Establishment of the Parliamentary Special Committee on Human Rights, Election and Institutional Reform**

In March 2023, Parliament established 10 Parliamentary Special Select Committees (PSSC), including the JPKP on Human Rights, Election and Institutional Reform led by the Member of Parliament for Selayang, YB William Leong. Despite the broad coverage of three thematic areas, the establishment of this committee is a positive step forward in prioritising election-related matters such as the appointment of EC members, strengthening EC’s autonomy, and reviewing legislation such as the Political Financing Act and Parliamentary Service Act.

Formed under the Unity Government, the PSSC has been empowered to discuss all relevant matters without ministerial approval<sup>269</sup>, allowing examination of legislation, petitions, and investigation of policies within their terms of reference<sup>270</sup>. Additionally, from March 2023, each special committee has a Grade 44 research officer assisting in implementation of the said JPKP’s role and functions, a departure from the previous practice of a single officer assisting all committees.

This empowerment is already evident, as the Chairman of the PSSC on Human Rights, Election and Institutional Reform promptly summoned the Attorney General, Datuk Ahmad Terrirudin Mohd Salleh, and former Attorney General Tan Sri Idrus Harun to explain the corruption case involving Deputy Prime Minister Datuk Seri Zahid Hamidi,

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267 Article 11(1) of the Bangkok Declaration: “When government resources are used to promote political interests during an election, the campaign process cannot be fair and the legitimacy of the result is called into question. Electoral laws must prohibit the unfair use of government resources for partisan political purposes at any time.”

268 Article 4(1) of the Inter-Parliamentary Union’s Declaration on Criteria for Free and Fair Elections (partial): “States should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law...”

269 Malaysian Parliament, “Penyata jawatankuasa pemilih Dewan Rakyat yang kelima belas menurut peratuan mesyuarat 76(2) peraturan-peraturan majlis mesyuarat Dewan Rakyat untuk dibentang atas meja mesyuarat” (Malaysian Parliament, 21 March 2023) <<https://www.parlimen.gov.my/ipms/eps/2023-03-21/DR.2.2023%20-%20DR%202023.pdf> > accessed 9 February 2024

270 Predeep Nambiar, ‘Putting more MPs in committees ‘to earn their keep’ (Free Malaysia Today, 25 March 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/03/25/putting-more-mps-in-committees-to-earn-their-keep/>> accessed 9 February 2024

who was discharged not amounting to acquittal (DNAA)<sup>271</sup>. Nevertheless, there had been no further reports on whether the Committee had indeed summoned both the Attorney General and the former Attorney General, or if they had appeared before the Committee to provide explanations. This reveals a key loophole in the PSSC's powers, perpetuated by contradictions between the Standing Orders of the Dewan Rakyat, the House of Parliament (Privileges And Powers) Act 1952 and practices in the Dewan Rakyat<sup>272</sup> – although Parliamentary Committees have the authority to formally call upon any party, if the summoned party does not appear before the Committee proceedings, the Committee has no power to take any action except through a motion to the Dewan to take action against the called party based on Standing Orders 80 and 80A. According to existing practices, only Ministers have the room and advantage to bring motions to the Dewan to be voted on by Members of Parliament because government motions are usually prioritized over motions from ordinary Members of Parliament, including the Chairperson of the Special Parliamentary Committee.

### **Half-Baked Parliamentary Reform: Constituency Development Fund (CDF) for Parliamentarians**

Constituency Development Fund (CDF) allocations for Parliamentarians is one of the pledges made by Pakatan Harapan in their PRU15 manifesto. Over the last few years, CDF has been among the key issues shaping the political climate in Malaysia. It contributed to political instability especially in the early days of PH's governance after PRU14, before the Sheraton Move took place in 2020. CDF, alongside the drafting of an anti-party hopping law, also formed a crucial aspect of the Memorandum of Understanding<sup>273</sup> between PH and the Federal Government led by Prime Minister Ismail Sabri in 2021.

Under the current Unity Government, however, CDF was only granted to government-aligned Parliamentarians. While Prime Minister Anwar Ibrahim expressed willingness to provide equal CDF allocation regardless of political alignment, he imposed a condition for the political opposition to negotiate with the Federal Government through Deputy Prime Minister II Dato Sri Fadillah Yusof<sup>274</sup>. This move drew criticism from the political opposition and civil society organisations (CSOs) like IDEAS Malaysia and BERSIH<sup>275</sup>, whilst at the same time also prompting several opposition Parliamentarians such as those

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271 Zulkifli Manzor, 'DNAA Zahid: Jawatankuasa Pilihan Khas Parlimen panggil Peguam Negara' (Kosmo!, 12 September 2023) <<https://www.kosmo.com.my/2023/09/12/dnaa-zahid-jawatankuasa-pilihan-khas-parlimen-panggil-peguam-negara/>> accessed 9 February 2024

272 Maha Balakrishnan, 'Unlocking the Powers of the Dewan Rakyat: The rule revisions needed now' (BERSIH, 2 June 2023) <<https://bersih.org/download/unlocking-the-powers-of-the-dewan-rakyat/>> accessed 1 March 2024

273 The full memorandum of understanding can be accessed here: <https://www.parlimen.gov.my/images/webuser/bkk/MOU.pdf>

274 Muhammad Yusri Muzamir, 'Kerajaan sedia runding isu peruntukan untuk Ahli Parlimen pembangkang' (Berita Harian, 10 April 2023) <<https://www.bharian.com.my/berita/nasional/2023/04/1088140/kerajaan-sedia-runding-isu-peruntukan-untuk-ahli-parlimen>> accessed 9 February 2024

275 BERSIH, 'Memaknai Kalimat Madani, Hormati Semua Wakil Rakyat Dengan CDF Sama Rata' (BERSIH, 27 November 2023) <<https://bersih.org/2023/11/27/memaknai-kalimat-madani-hormati-semua-wakil-rakyat-dengan-cdf-sama-rata/>> accessed 9 February 2024

from Kuala Kangsar, Labuan, Gua Musang, Jeli, Besut and Tanjong Karang to declare their support for the Federal Government and align with Anwar's leadership.

Equitable CDF allocation is crucial as Parliamentarians serve constituents and communities. Withholding CDF penalises voters' freedom to choose representatives, impacting those who opt for non-government-aligned representatives.

### **Electoral Re-delineation**

Aside from conducting elections to the Dewan Rakyat and DUNs, the EC is also tasked with reviewing federal and state constituency boundaries<sup>276</sup>. This review may be initiated at least 8 years after the previous re-delineation<sup>277</sup>. In 2015, the Dewan Rakyat approved the re-delineation proposal for Sarawak, increasing the Sarawak DUN seats from 71 to 82. The federal re-delineation proposal was approved in March 2018, two months prior to PRU14, resulting in changes to 98 parliamentary constituencies and 28 DUN seats<sup>278</sup>. In July 2019, the Dewan Rakyat approved a re-delineation proposal for the Sabah DUN, increasing seats from 60 to 73<sup>279</sup>. Subsequent re-delineation exercises can be undertaken in Sarawak anytime from 2023, federal seats in 2026 and Sabah in 2027. Although media reports suggested the commencement a re-delineation study in Sarawak, EC Chairman Tan Sri Abdul Ghani Salleh denied its initiation due to the remaining effective timeframe<sup>280</sup>. Sarawak's Premier Tan Sri Abang Johari Tun Openg, on the other hand, stated that a re-delineation study will be proposed for the state<sup>281</sup>.

Several issues persist, with malapportionment<sup>282</sup> being a significant concern. Lowering the voting age to 18 and implementing automatic voter registration has increased voters in all

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276 The Electoral Commission is tasked with reviewing federal and state constituency boundaries under Article 113(2)(i) of the Federal Constitution: "Subject to paragraph (ii), the Election Commission shall, from time to time, as they deem necessary, review the division of the Federation and the States into constituencies and recommend such changes therein as they may think necessary in order to comply with the provisions contained in the Thirteenth Schedule; and the reviews of constituencies for the purpose of elections to the Legislative Assemblies shall be undertaken at the same time as the reviews of constituencies for the purpose of elections to the House of Representatives."

277 Article 113(2)(ii) of the Federal Constitution: "There shall be an interval of not less than eight years between the date of completion of one review, and the date of commencement of the next review, under this Clause"

278 'Dewan Rakyat lulus usul persempadanan semula pilihan raya' (Astro Awani, 28 March 2018) <<https://www.astroawani.com/berita-malaysia/dewan-rakyat-lulus-usul-persempadanan-semula-pilihan-raya-171594?>> accessed 9 February 2024

279 Luqman Arif Abdul Karim, 'Usul tambah kerusi DUN Sabah lulus' (Berita Harian, 17 July 2019) <<https://www.bharian.com.my/berita/nasional/2019/07/586231/usul-tambah-kerusi-dun-sabah-lulus>> accessed 9 February 2024

280 'Lat tempoh masih berkuat kuasa, SPR tidak rancang laksana kajian semula persempadanan' (Astro Awani, 1 January 2024) <<https://www.astroawani.com/berita-malaysia/lat-tempoh-masih-berkuat-kuasa-spr-tidak-rancang-laksana-kajian-semula-persempadanan-452202>> accessed 9 February 2024

281 'PBB akan kemuka cadangan persempadanan semula di Sarawak - Abang Johari' (Astro Awani, 1 January 2024) <<https://www.astroawani.com/berita-malaysia/pbb-akan-kemuka-cadangan-persempadanan-semula-di-sarawak-abang-johari-452279>> accessed 9 February 2024

282 Malapportionment is "disparity of electoral constituency size caused by alterations of electoral boundaries. The uneven electorate size of constituencies produces an uneven outcome of unequal vote values across constituencies." (Wong Chin Huat, 'Curbing Intra-

constituencies. A prominent example is the constituency of Bangi that has 311,469 voters, compared to Sabak Bernam that has 51,842 voters. The number of voters in each constituency in a state should be approximately equal, with the exception of challenges faced by rural constituencies in reaching voters in which a measure of weightage for area would be undertaken<sup>283</sup>. The existing voter imbalance thus necessitates a comprehensive review of electoral boundaries for fairness to voters as well as representatives for parliamentary constituencies and DUNs.

In November 2023, BERSIH, alongside election management bodies and CSOs<sup>284</sup> from eight countries<sup>285</sup>, issued a joint "Kuala Lumpur Declaration on Apportionment and Boundary Delimitation" calling on authorities administering boundary delimitation in the Asia-Pacific region, including Malaysia, to adopt best practices on apportionment, boundary delimitation, as well as process and institution of delimitation<sup>286</sup>. Among the recommendations given is the 'one person, one vote, one value' (OPOVOV) principle in the delimitation of constituencies as enshrined in the International Covenant on Civil and Political Rights (ICCPR), which requires constituencies to have numbers of voters within a maximum deviation of no more than 10% from the average.

### Local Government Elections

Local government elections (LCE) in Malaysia were abolished in 1976 through amendments to the Local Government Act 1976, replacing them with the appointment of Local Authority Council (PBT) members<sup>287</sup>. The last LCE occurred in 1963, suspended in 1965 due to the Malaysia-Indonesia confrontation.

Discussions on local governance in Malaysia are often intertwined with ethnic issues. Some argue that specific ethnic groups would dominate local governments, especially in major cities. The concern of potential erosion of Malay and Islamic political power should LCEs be reinstated is articulated by Malay-centric political parties, i.e., PAS<sup>288</sup> and

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State Malapportionment and Gerrymandering with Amendments to State Constitutions' (p. 78), Making Democracy Work: Institutional Reforms for Malaysia)

283 Subsection 2(c) in the 13th Schedule of the Federal Constitution: "the number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies"

284 Tindak Malaysia, the International Institute for Democracy and Electoral Assistance (International IDEA), and Indonesia's Association for Elections and Democracy (PERLUDEM)

285 The said eight countries consisted of Australia, Bhutan, India, Indonesia, Malaysia, Mongolia, the Philippines and Sri Lanka

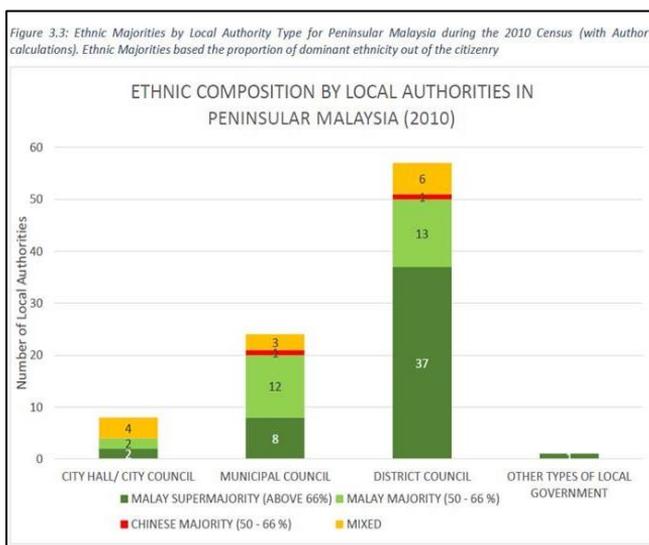
286 BERSIH, 'Regional Roundtable Concluded with the Kuala Lumpur Declaration on Apportionment and Boundary Delimitation' (BERSIH, 1 November 2023) <<https://bersih.org/2023/11/01/regional-roundtable-concluded-with-the-kuala-lumpur-declaration-on-apportionment-and-boundary-delimitation/>> accessed 9 February 2024

287 Rohaniza Idris, 'Pilihan Raya PBT mansuh 47 tahun lalu' (Berita Harian, 21 December 2023)<<https://www.bharian.com.my/berita/nasional/2023/12/1191329/pilihan-roya-pbt-mansuh-47-tahun-lalu>> accessed 9 February 2024

288 NS Ramli, 'DAP mahu kuasai bandar besar melalui pilihan raya PBT - PAS' (Malaysiakini, 21 December 2023) <<https://www.malaysiakini.com/news/690758>> accessed 9 February 2024

UMNO<sup>289</sup>. Political will by the current Unity Government to reinstate LCEs is also weak, as demonstrated in statements by the Housing and Local Government Minister YB Nga Kor Ming<sup>290</sup> and the Federal Territories Minister Dr. Zaliha Mustafa<sup>291</sup>.

The aforementioned concern is unfounded in light of BERSIH’s analysis at the local government level of the composition in selected major cities in Peninsula Malaysia, which found that the Bumiputera population in major cities is growing rapidly compared to other ethnic groups such as the Indians and the Chinese. Based on the 2010 census data, in fact, only two local governments, i.e., Kampar District Council and Penang Island City Council<sup>292</sup>, have a Chinese majority. Among eight local city councils, half of them have a Malay majority, out of which two of them (Alor Setar and Kuala Terengganu) have a Malay supermajority. As for the remaining four local city councils, only two of them respectively in Kuala Lumpur and Ipoh have a Chinese majority.



*Ethnic Majorities by Local Authority Type for Peninsular Malaysia in the 2010 Census*<sup>293</sup>

289 Rosilawati Rosedi, 'Pilihan raya kerajaan tempatan tidak sesuai - Wan Rosdy' (Sinar Harian, 22 December 2023)

<<https://www.sinarharian.com.my/article/640886/berita/politik/pilihan-raya-kerajaan-tempatan-tidak-sesuai---wan-rosdy>> accessed 9 February 2024

290 Mohd Farhan Darwis, 'Local council elections not a priority, says Nga' (Free Malaysia Today, 28 December 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/12/28/local-council-elections-not-a-priority-says-nga/>> accessed 9 February 2024

291 'Other issues take priority over local council elections, says Zaliha' (Free Malaysia Today, 18 December 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/12/18/other-issues-take-priority-over-local-council-election-says-zaliha/>> accessed 9 February 2024

292 In 2010, the said local government was called Penang Island Municipal Council (MPPP). It was not until 2015 that it was renamed as the Penang Island City Council (MBPP). The latest name is used in this chapter

293 Danesh Prakash Chacko, 'Reintroduction of Local Government Elections in Malaysia' (BERSIH, 20 January 2021)

<<https://BERSIH.org/download/BERSIH-policy-research-reintroduction-of-local-government-elections/>> accessed 9 February 2024

Local Governments impose taxes on residents and Malaysia has an odd situation where this form of local authority lacks direct channel of accountability (via voting). The absence of local government elections not only denies accountability but creates an additional burden for Members of Parliament and State Legislative Assemblypersons to take on very localised issues<sup>294</sup>.

## **Conclusion**

Swift reforms are crucial to ensure true access to democracy via free and fair elections. On this basis, addressing electoral issues highlighted above, namely limited access to voting experienced by postal and overseas voters, misuse of government resources, electoral re-delineation and institutional reform issues are paramount.

The EC, as the sole electoral management body in Malaysia, needs to adopt a more proactive and assertive approach in tackling electoral challenges. Strengthening collaboration between the EC and law enforcement agencies and CSOs is essential to improve the country's electoral processes, setting a benchmark for the region and the global arena. The Federal Government should also consider recommendations from entities such as BERSIH to empower the EC, by granting enforcement powers to relevant government agencies such as the Malaysian Anti-Corruption Commission (MACC) and the Royal Malaysian Police (PDRM) to implement election regulations and laws.

Simultaneously, institutional reforms, including strengthening the role of Parliament, especially through JPKP, should be prioritised to enable effective check-and-balance against the Executive. Equitable CDF allocation, on the other hand, contributes to not only political stability but also the development of a mature political culture underpinned by healthy competition through substantive policy debates.

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294 Ibid



FREEDOM  
OF RELIGION  
AND BELIEF

# FREEDOM OF RELIGION AND BELIEF

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Peer Reviewer: Nurhuda Ramli*

In 2023, Freedom of Religion and Belief (FoRB) remained challenged and suppressed in Malaysia. This chapter highlights ongoing challenges and controversies related to religious freedom and the laws of religious practices and expressions. Particularly in the context of Islam as the state religion and its interactions with other faiths. Violations of the right to religious freedom at the state level have ramifications that extend beyond state-endorsed discrimination. But it also has an alarming societal impact of contributing to a troubling pattern of societal coercion and violence.

## Religious Blasphemy

Malaysia is one of the countries that sanction insults and dissenting views against individuals for offending, insulting or disparaging religious doctrines, symbols, authorities or institutions related to Islam. At the federal level, there are a number of laws<sup>295</sup> that are commonly used to curb religious blasphemy or insults. On the other hand, at the state level, there are a total of 89 provisions in the state Syariah Criminal Enactments or Acts and fatwas that sanction religious blasphemy<sup>296</sup>. Offences under the Shariah typically involve insults or bringing into contempt the religion of Islam and its institution in Malaysia. In most cases, there was a trend several years back that the laws were selectively used by the authorities to only sanction religious insults against Islam, the majority religion, but not religions other than Islam.

Firstly, the trend shows that there was inaction over cases of insult of religions other than Islam. Often these cases of insult were seditious hate speech in nature and no actions were taken against the perpetrator unless a private prosecution was filed by a non-governmental organisation or a member of the public. Secondly, there was no immediate action or hefty punishments if the insult was against religion other than Islam.

Prior to 2023, several cases illustrated the trend of heavy penalisation over insults towards Islam. In July 2022, Siti Nuramira Abdullah was charged under Section 298A(1)(a) of the Penal Code for deliberately causing disunity, ill will or hatred on the grounds of religion<sup>297</sup>. She was charged for an open mic comedy skit at the Crackhouse Comedy Club. Following her release on bail on 19 July 2022, the Federal Territory Islamic Religious Department (JAWI) intended to charge her at the Shariah Court for the offence of insulting, or bringing

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295 Section 298 and 298A (1) of the Penal Code, Section 3 (1) and 4 (1) of the Sedition Act 1948, Section 233 of the Communications and Multimedia Act 1998 and Section 7 (1) of the Printing Presses and Publications Act 1984

296 INITIATE.MY, 'Database on Malaysian Laws that Impact Freedom of Religion and Belief (FORB)' <<https://initiate.my/freedom-of-religion-and-belief/>> accessed 8 November 2023

297 '[UPDATED] Crackhouse fiasco woman pleads not guilty to inciting religious disharmony' (The Vibes, 13 July 2022) <<https://www.thevibes.com/articles/news/65704/crackhouse-fiasco-woman-pleads-not-guilty-to-inciting-religious-disharmony>> accessed 14 February 2024

into contempt, the religion of Islam. Although the charge never occurs due to the possibility of double jeopardy<sup>298</sup>. In July 2022, Saiyidinar Abu Bakar<sup>299</sup> was charged and imprisoned for 6 months and was fined RM 10,000 under the Communications and Multimedia Act for insulting Islam in a Facebook post. In February 2019, Mohamad Yazid Kong Abdullah<sup>300</sup> was similarly charged with the same type of offence.

On the other hand, insults against religions other than Islam often require extra efforts to hold the perpetrator accountable. Wan Asshimah Kamarudin<sup>301</sup> who called for the desecration of churches in Sarawak in 2021 were only charged after 61 police reports were lodged by members of the public. Zakir Naik's<sup>302</sup> remarks that questioned the loyalty of Malaysian Hindus and referred to the Chinese as "old guests" left him unpunished. After 115 police reports were made, he was only banned from speaking in public in Malaysia and was not charged under any laws for inciting racial and religious hatred. Similarly, Ustaz Syakir Nasoha's<sup>303</sup> insults towards Hindus, Christians and the Buddhists in 2021 left him unpunished even though a total of 3,000 reports were lodged against him.

In March 2023, a 40-year-old man was detained by the police for allegedly insulting Islam, Allah and the Prophet, through his Facebook account<sup>304</sup>. He subsequently faced 10 counts of charges for deliberately making and disseminating offensive communication mixed with insults<sup>305</sup>. In the same month, a 27-year-old man was also detained for allegedly

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298 'Comedy club woman 'will face double jeopardy' with shariah charge' (Free Malaysia Today, 15 July 2022)

<<https://www.freemalaysiatoday.com/category/nation/2022/07/15/comedy-club-woman-will-face-double-jeopardy-with-shariah-charge/>> accessed 1 March 2024

299 Astro Awani. (2022, July 25). [Facebook Video] Facebook. <https://www.facebook.com/astroawani/videos/hina-agama-penganggur-dihukum-penjara-enam-bulan-denda-rm10000/998250847515904/>

300 'Unemployed man jailed 7 months, fined RM10,000 for insulting Islam' (New Straits Times, 13 March 2019).

<<https://www.nst.com.my/news/crime-courts/2019/03/468159/unemployed-man-jailed-7-months-fined-rm10000-insulting-islam>> accessed 1 March 2024

301 Nancy Nais, 'Permanent court injunction issues against Wan Asshima Kamaruddin for religious hate speech' (Dayak Daily, 10 August 2022) <<https://dayakdaily.com/permanent-court-injunction-issued-against-wan-asshima-kamaruddin-for-religious-hate-speech/>> accessed 1 March 2024

302 'Police probing 115 reports against Zakir, 6 against Dong Zong' (Malaysiakini, 15 August 2019)

<<https://www.malaysiakini.com/news/488070>> accessed 1 March 2024

303 Qistina Nadia Dzulqarnain, 'Ustaz with 3,000 reports lodged against him says remarks 'misconstrued'' (The Vibes, 5 October 2021)

<<https://www.thevibes.com/articles/news/43670/ustaz-with-3000-reports-lodged-against-him-says-remarks-misconstrued>> accessed 1 March 2024

304 Austin Camoens, 'Man arrested in Wangsa Maju for allegedly insulting Islam' (The Star, 10 May 2023)

<<https://www.thestar.com.my/news/nation/2023/05/10/man-arrested-in-wangsa-maju-for-allegedly-insulting-islam>> accessed 8 November 2023

305 'In Johor, trader charged with insulting God, Islam and Prophet on Facebook' (Malay Mail, 7 June 2023)

<<https://www.malaymail.com/news/malaysia/2023/06/07/in-johor-trader-charged-with-insulting-god-islam-and-prophet-on-facebook/73076>> accessed 8 November 2023

Man accused of insulting God, Islam and prophet' (Free Malaysia Today, 7 June 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/06/07/man-accused-of-insulting-god-islam-and-prophet/>> accessed 8 November 2023

insulting the royal institution and making racially insensitive statements through his X account<sup>306</sup>. This comes after the Royal Malaysia Police (PDRM) established a special team to investigate cases that involve insults against religion, race and the royal institution (3R) a month prior<sup>307</sup>.

Additionally in March of the same year, a 2021 indie film *Mentega Terbang* came under the spotlight and faced the fury of religious conservatives for allegedly coaxing children to question and leave Islam<sup>308,309</sup>. The film was finally banned in September following a publication of a government gazette under the Film Censorship (Prohibition) Order 2023<sup>310</sup>. Amidst backlash against the film, the director and screenwriter received death threats and sexual harassment. Both of them also faced real-life aggression when their cars were damaged by paint and acid<sup>311</sup>. In January 2024, both the director and producer of the film were charged under Section 298 of the Penal Code for wounding the religious feelings of others<sup>312</sup>. These charges clouded the Malaysian film industry's future as restrictions on artistic expressions will not encourage open and constructive dialogue for Malaysians.

While laws designed to prevent religious blasphemy come with the intention of maintaining social harmony, the selective application of these laws and the presence of state-level provisions prohibit critical thinking and a cross-cultural perspective in assessing the legal system's consistency. Additionally, as illustrated above, laws enacted

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306 'Man arrested for allegedly insulting royalty, making racially provocative statements on Twitter' (New Straits Times, 26 May 2023) <<https://www.nst.com.my/news/crime-courts/2023/05/913464/man-held-allegedly-insulting-royal-institution-racial-provocation>> accessed 8 November 2023

307 'Police set up special team to investigate cases involving insults to religion, race and royal institution' (Malay Mail, 8 April 2023) <<https://www.malaymail.com/news/malaysia/2023/04/08/police-set-up-special-team-to-investigate-cases-involving-insults-to-religion-race-and-royal-institution/63859>> accessed 8 November 2023

308 Hadi Azmi, 'Malaysia filmmakers face fury of religious conservatives as Mentega Terbang becomes latest cultural war target' (South China Morning Post, 12 March 2023) <<https://www.scmp.com/week-asia/lifestyle-culture/article/3213144/malaysia-filmmakers-face-fury-religious-conservatives-mentega-terbang-becomes-latest-cultural-war>> accessed 8 November 2023  
'Seniman lodges police report over movie that allegedly insults Islam' (New Straits Times, 3 March 2023) <<https://www.nst.com.my/news/crime-courts/2023/03/885641/seniman-lodges-police-report-over-movie-allegedly-insults-islam>> accessed 8 November 2023

309 'Kenyataan Media Isu Filem "Mentega Terbang"' (Kementerian Dalam Negeri, 3 March 2023) <[https://www.moha.gov.my/images/Agensi/UKOM/KENYATAAN\\_MEDIA\\_ISU\\_FILEM\\_MENTEGA\\_TERBANG1.pdf](https://www.moha.gov.my/images/Agensi/UKOM/KENYATAAN_MEDIA_ISU_FILEM_MENTEGA_TERBANG1.pdf)> accessed 8 November 2023

310 Kenneth Tee, 'Govt bans 'Mentega Terbang' film and its related publicity materials' (Malay Mail, 13 September 2023) <<https://www.malaymail.com/news/malaysia/2023/09/13/govt-bans-mentega-terbang-film-and-its-related-publicity-materials/90576#:~:text=KUALA%20LUMPUR%2C%20Sept%2013%20%E2%80%94%20Putrajaya,and%20published%20on%20Septemb>> accessed 8 November 2023

311 'Mentega Terbang' director receives death threats' (Free Malaysia Today, 16 March 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/03/16/mentega-terbang-director-receives-death-threats/>> accessed 8 November 2023

312 Amalia Azmi, "'Mentega Terbang' producer and director to be charged for allegedly offending religious beliefs' (New Straits Times, 15 January 2024) <<https://www.nst.com.my/news/crime-courts/2024/01/1001694/mentega-terbang-producer-and-director-be-charged-allegedly>> accessed 1 March 2024

by the state create an enabling and conducive environment for intolerance and extremist behaviour to thrive. This has allowed for a condition of state-sponsored discrimination, wherein ordinary citizens take the law into their own hands by committing violence against those with whom they disagree.

### Unilateral Conversion of Minors

The Federal Court's ruling on *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors*<sup>313</sup> in 2018 established a favourable precedent by declaring unilateral conversions of children to Islam as unlawful. The issue of unilateral conversion, nevertheless, has still persisted as one of the major issues when it comes to the exercise of religious freedom in Malaysia.

In the latest development in October 2023, Indira Gandhi's appeal hearing for leave to initiate contempt against IGP was rescheduled to April 2024<sup>314</sup>. In March 2023, Indira Gandhi along with two other women who claimed to be victims of unilateral conversion to Islam joined 11 other plaintiffs in initiating a legal challenge against 8 state governments regarding laws that permit unilateral conversions without the consent of both parents<sup>315</sup>. In October, the High Court permitted the Federal Territory Islamic Religious Council (MAIWP) and the Johor Islamic Religious Council (MAIJ) to intervene due to merit, but rejected the application by the Badan Peguam Syarie Wilayah Persekutuan (BPSWP) to intervene in the case<sup>316</sup>. In the process, one of the plaintiffs in the legal challenge was alleged to have been harassed by five Kota Tinggi Islamic Religious Council officers sometime in the same month. The mother was in her residence with her children in Kota Tinggi on 29 March when the five religious officers visited, allegedly harassing her and reprimanding her for initiating the legal challenge<sup>317</sup>. She then applied for leave to initiate contempt proceedings against the five officers for harassment<sup>318</sup>. In September, her

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313 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545

314 'Recovery order to find daughter taken by convert dad: Indira Gandhi's appeal hearing for leave to initiate contempt against IGP rescheduled to April next year' (Malay Mail, 31 October 2023) <<https://www.malaymail.com/news/malaysia/2023/10/31/recovery-order-to-find-daughter-taken-by-convert-dad-indira-gandhis-appeal-hearing-for-leave-to-initiate-contempt-against-igp-rescheduled-to-april-next-year/99471>> accessed 14 February 2024

315 Nurbaiti Hamdan, 'M. Indira Gandhi and 13 other plaintiffs file legal challenge against unilateral conversion' (The Star, 20 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/20/m-indira-gandhi-and-13-other-plaintiffs-file-legal-challenge-against-unilateral-conversion#:~:text=KUALA%20LUMPUR%3A%20Hindu%20mother%20M,the%20consent%20of%20both%20parents>> accessed 1 March 2024

316 High Court allows MAIWP, MAIJ to intervene in suit by Indira Gandhi on unilateral conversion of children to Islam' (Malay Mail, 23 October 2023) <[https://www.malaymail.com/news/malaysia/2023/10/23/high-court-allows-maiwp-maij-to-intervene-in-suit-by-indira-gandhi-on-unilateral-conversion-of-children-to-islam/97924#google\\_vignette](https://www.malaymail.com/news/malaysia/2023/10/23/high-court-allows-maiwp-maij-to-intervene-in-suit-by-indira-gandhi-on-unilateral-conversion-of-children-to-islam/97924#google_vignette)> accessed 14 February 2024

317 Hidir Reduan Abdul Rashid, 'Mother allegedly harassed over unilateral conversion suit' (Malaysiakini, 30 March 2023) <<https://www.malaysiakini.com/news/660459>> accessed 1 March 2024

318 Hidir Reduan Abdul Rashid, 'Sept 12 decision on leave to commence contempt against 5 religious officers' (Malaysiakini, 2 August 2023) <<https://www.malaysiakini.com/news/674058>> accessed 14 February 2024

application was however rejected by the High Court stating that it lacked specific details regarding the officers involved, such as their names and positions<sup>319</sup>.

In a separate case, Loh Siew Hong, a mother of three whose children were converted to Islam by her former husband in 2020, is seeking a declaration that her children are Hindus and asserting that their conversion to Islam without her consent is legally invalid. Furthermore, she aims to reverse the Certificate of Conversion issued for her children on July 7th, 2020. In May, the High Court ruled that the conversion of her three children was valid and done in accordance with the law<sup>320</sup>. Loh was however granted sole custody and guardianship of both children. In October, the High Court dismissed an application by the Perlis Islamic Religious and Malay Customs Council (MAIPs) to provide Islamic education to the three child converts since Loh is a non-Muslim<sup>321</sup>. In challenging the High Court decision, Loh's appeal was recently allowed by the Court of Appeal to set aside a High Court ruling that declared the unilateral conversion of her three minor children to Islam in Perlis four years ago constitutional<sup>322</sup>. She won the appeal, and the court asserted its obligation to abide by the ruling in the Indira Gandhi case, which established that obtaining consent from both parents is necessary before a minor can undergo religious conversion. However, in February this year, the Perlis Islamic Religious and Malay Customs Council (MAIPs) filed an application for leave to appeal against the Court of Appeal's decision<sup>323</sup>.

In another case, a Selangor-born woman named D is fighting a lengthy legal battle for the court to declare that she is "not a person professing the religion of Islam"<sup>324</sup>. Her lawyer, Dato' Malik Imtiyaz told the Federal Court that D's mother converted to Islam in 1991, allegedly converting D at four and a half years old. D's father however, was unaware of the conversion and therefore never consented. The lawyer argued that under Selangor's

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319 Timothy Achariam, 'High Court rejects leave application for contempt proceedings against five Johor religious officers over alleged harassment' (The Edge Malaysia, 12 September 2023) <<https://theedgemaalaysia.com/node/682169>> accessed 1 March 2024

320 Nurbaiti Hamdan, 'M. Indira Gandhi and 13 other plaintiffs file legal challenge against unilateral conversion' (The Star, 20 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/20/m-indira-gandhi-and-13-other-plaintiffs-file-legal-challenge-against-unilateral-conversion#:~:text=KUALA%20LUMPUR%3A%20Hindu%20mother%20M,the%20consent%20of%20both%20parents>> accessed 8 November 2023

321 'High Court rejects MAIPs bid to provide Islamic education to child converts' (The Star, 11 October 2023) <<https://www.thestar.com.my/news/nation/2023/10/11/high-court-rejects--maips-bid-to-provide-islamic-education-to-child-converts>> accessed 8 November 2023

322 V Anbalagan, 'Loh wins appeal to reverse children's conversion to Islam' (Free Malaysia Today, 10 January 2024) <<https://www.freemalaysiatoday.com/category/nation/2024/01/10/loh-wins-appeal-to-reverse-childrens-conversion-to-islam/>> accessed 1 March 2024

323 V Anbalagan, 'MAIPs takes minors' unilateral conversion case to Federal Court' (Free Malaysia Today, 9 February 2024) <<https://www.freemalaysiatoday.com/category/nation/2024/02/09/perlis-govt-maips-take-minors-unilateral-conversion-case-to-federal-court/>> accessed 1 March 2024

324 Ida Lim, 'Selangor-born woman, allegedly 'converted' at four was never a Muslim as 1952 law prohibited conversion of children, lawyer tells Federal Court' (Malay Mail, 16 January 2024) <<https://www.malaymail.com/news/malaysia/2024/01/16/selangor-born-woman-allegedly-converted-at-four-was-never-a-muslim-as-1952-law-prohibited-conversion-of-children-lawyer-tells-federal-court/112694>> accessed 1 March 2024

1952 law, minors couldn't be converted, making D's conversion invalid. Her application in the Shariah courts was rejected and her case was heard for the first time in February 2024 in the Federal Court. Previously in 2022, the High Court ruled that her conversion in 1991 was invalid<sup>325</sup>.

In the latest development, the issue of unilateral conversion of minors to Islam will be referred to a special committee for fine-tuning, as stated by the Minister in Prime Minister's Department (Religious Affairs) Datuk Mohd Na'im Mokhtar<sup>326</sup>. This suggests a positive development as it indicates a willingness to address and potentially rectify concerns surrounding unilateral conversions, which have been a contentious issue in Malaysia.

Transferring custody of a Muslim child to a non-Muslim parent is considered an offence under Shariah criminal laws in Malaysia. The justification behind this legal provision often rests on the concept of coercion which suggests that the conversion of one parent places undue pressure on the child's religious upbringing. Consequently, custody is often granted to the Muslim parent or guardian to uphold the child's adherence to Islamic practices and beliefs. Unilateral conversion infringes both parental rights and autonomy, it can also lead to significant emotional and psychological ramifications towards the children involved.

### **Moral Policing**

The imposition of a set of moral standards based on traditional and conservative values is not a foreign concept within Malaysian society. This typically involves regulating the behaviour and lifestyle choice of others in public spaces. For instance, indecent acts<sup>327</sup> and exposing *aurat*<sup>328</sup> in public places are considered offences under the Kelantan Syariah Criminal Code (I) Enactment 2019.

In January 2023, the Permatang Pauh MP held discussions with the management of Sunway Carnival Mall expressing concerns about the open sale of alcohol at the mall during the upcoming Chinese New Year celebration. Despite the promotion being targeted at non-Muslims and being conducted within legal boundaries, the management chose to bow to his request and opted to discontinue the sale of alcohol<sup>329</sup>.

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325 Ida Lim, 'High Court declares Selangor-born woman 'not a Muslim', says her unilateral conversion to Islam at age four invalid' (Malay Mail, 4 April 2022) <<https://www.malaymail.com/news/malaysia/2022/04/04/high-court-declares-selangor-born-woman-not-a-muslim-says-her-unilateral-co/2051427>> accessed 1 March 2024

326 'Unilateral conversion of minors to Islam issue to be referred to special committee for fine tuning, says religious affairs minister' (Malay Mail, 13 January 2024) <<https://www.malaymail.com/news/malaysia/2024/01/13/unilateral-conversion-of-minors-to-islam-issue-to-be-referred-to-special-committee-for-fine-tuning-says-religious-affairs-minister/112282>> accessed 1 March 2024

327 Section 21 of the Kelantan Syariah Criminal Code (I) Enactment 2019

328 Section 23 of the Kelantan Syariah Criminal Code (I) Enactment 2019

329 Audrey Dermawan, 'Permatang Pauh MP gets mixed reactions over alcohol sale objection' (New Straits Times, 10 January 2023) <<https://www.nst.com.my/news/nation/2023/01/869001/permatang-pauh-mp-gets-mixed-reactions-over-alcohol-sale-objection>> accessed 8 November 2023

In the same month, a woman was denied entry to a police station in Kajang following a car accident because her attire was deemed inappropriate<sup>330</sup>. Similarly in February of the same year, a woman was refused entry to the Kampar Hospital for treatment due to her attire<sup>331</sup>. Witnesses reported that the woman was scolded by medical staff for her 'indecent dress'. This was followed by the news of another woman being barred from entering the Companies Commission of Malaysia (SSM) building by an employee who said she failed to comply with the dress code guidelines<sup>332</sup>. In April 2023, seven men were issued a warning for wearing shorts in Tanah Merah, Kelantan<sup>333</sup>. The offence carried a fine of up to RM1,000 or six months in prison, if convicted.

In June 2023, a RELA officer was suspended after he denied a woman in a skirt from entering a SOCSO building in Penang<sup>334</sup>. In the following month, a non-Muslim woman was fined in Kelantan for wearing shorts in her own clothing store<sup>335</sup>. She was fined under Section 34(2)(b) of MPKB's Business and Industrial Trade By-Laws 2019. Many expressed their concerns and fears that non-Muslims were being subjected to Muslim standards. In October, a state tourism exco member said that Terengganu would ramp up enforcement of Syariah dress code of visitors by working with companies to ensure compliance<sup>336</sup>. In December 2023, a man was required to wear *sarong* before entering the Kuala Selangor

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330 Reshna Reem Ganesan, 'Woman denied entry to police station over attire' (Free Malaysia Today, 31 January 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/01/31/woman-in-shorts-denied-entry-to-police-station/>> accessed 8 November 2023

331 'Another woman refused entry for wearing shorts, this time at a hospital' (The Vibes, 14 February 2023)

<<https://www.thevibes.com/articles/news/85268/another-woman-refused-entry-for-wearing-shorts-this-time-at-a-hospital>> accessed 8 November 2023

332 Manjit Kaur, 'Hemline hullabaloo: Women barred from govt building in Ipoh over dressing' (The Star, 10 March 2023)

<<https://www.thestar.com.my/news/nation/2023/03/10/hemline-hullabaloo-woman-barred-from-govt-building-in-ipoh-over-dressing>> accessed 8 November 2023

333 'Expect 1 year jail for wearing shorts in Kelantan' (Focus Malaysia, 1 April 2023) <<https://focusmalaysia.my/expect-1-year-jail-for-wearing-shorts-in-kelantan/>> accessed 8 November 2023

334 Adie Zulkifli, 'Rela member denying entry to woman over dress code an isolated incident, insists Saifuddin' (New Straits Times, 3 July 2023) <<https://api.nst.com.my/news/nation/2023/07/926827/rela-member-denying-entry-woman-over-dress-code-isolated-incident-insists>> accessed 8 November 2023

335 Eileen Ng, 'Non-Muslim Malaysian woman fined for wearing shorts in Kelantan' (The Straits Times, 3 July 2023)

<<https://www.straitstimes.com/asia/se-asia/non-muslim-malaysian-woman-fined-for-wearing-shorts-in-kelantan#:~:text=Non%2DMuslim%20Malaysian%20woman%20fined%20for%20wearing%20shorts%20in%20Kelantan,-The%20unnamed%20woman&text=A%20non%2DMuslim%20woman%20in,authority%20to%20cancel%20the%20fine>> accessed 8 November 2023

336 'Terengganu to ramp up enforcement of Shariah dress code' (Free Malaysia Today, 8 October 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/10/08/terengganu-to-ramp-up-enforcement-of-shariah-dress-code/>> accessed 8 November 2023

Municipal Council (MPKS) office. The security guard who gave the order said that it was part of the new rule that shorts were not allowed on the premises<sup>337</sup>.

Additionally, a famous moral vigilante and anti-vice group in Sungai Petani, Skuad Badar has organised multiple raids throughout 2023. In January, the group caught a couple on the night of New Year's Eve for *khalwat*<sup>338</sup>. In September, the group organised a raid to catch trans women in Sungai Petani<sup>339</sup>. *Khalwat* and crossdressing are both criminal offences under the Syariah law in Kedah.

Moral policing provisions under the Syariah law does not only empower religious authorities to prosecute Muslims who commit moral offences within the purview of the state jurisdiction. It has also inspired other Muslims to take laws into their own hands to impose their moral standard upon others. The moral vigilante or anti-vice group is one of the newest phenomena that inspire normal citizens, whether individually or in groups, to coerce Islamic principles that impact Muslims and non-Muslims alike. In most cases, women are the victims of this practice.

### **Prosecution of Religious Minorities**

Malaysia officially recognises only Sunni Islam, and non-Sunni denominations, including Shia, Ahmadiyya, some Sufi Tariqat, and religious-based cult groups, are considered deviant mainly in gazetted *fatwas* that have a legal binding effect. Practising these minority religions can lead to legal punishment for false worship, teaching without permission, and spreading religious doctrine.

The status for Shia and Ahmadiyya Muslims has remained the same in 2023. In total, there are 15 gazetted fatwas against the Shia community and 4 counts of gazetted fatwas against Ahmadiyya Muslims since 1997<sup>340</sup>.

In the newest development, the Perak Fatwa Council in July has declared the teachings of Si Hulk (Society of Islamic Holisticism Universal Linkage Knowledge) group, which was founded by Suhaini Mohammad, as deviant. In the same month, the Johor Islamic Religious Department (JAINJ) announced that they will be working with the Malaysian Communications and Multimedia Commission (MCMC) and PDRM to investigate and

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337 R Sekaran, 'Man in shorts made to wear sarong before entering Kuala Selangor council office' (The Star, 15 December 2023) <<https://www.thestar.com.my/news/nation/2023/12/15/man-in-shorts-made-to-wear-sarong-before-entering-kuala-selangor-council-office>> accessed 1 March 2024

338 azharmohamadat. [Bani Tanah Jawi] (2023, January 1). [TikTok video]. TikTok.

<[https://www.tiktok.com/@azharmohamadat/video/7183562010460785946?\\_r=1&\\_t=8gQKEVwR3VS](https://www.tiktok.com/@azharmohamadat/video/7183562010460785946?_r=1&_t=8gQKEVwR3VS)> accessed 8 November 2023

339 azharmohamadat. [Bani Tanah Jawi] (2023, September 18). [TikTok video]. TikTok. Taman Jubli Adalah Tempat Orang Awam Beriadah, Dan Bukannya Tempat Melakukan Aktiviti Tidak Bermoral.

<[https://www.tiktok.com/@azharmohamadat/video/7280025932625169665?\\_r=1&\\_t=8gQKI5WLCVT](https://www.tiktok.com/@azharmohamadat/video/7280025932625169665?_r=1&_t=8gQKI5WLCVT)>

340 INITIATE.MY, 'Database on Malaysian Laws That Impact Freedom of Religion and Belief (FoRB)' <<https://initiate.my/freedom-of-religion-and-belief/>> accessed 8 November 2023

curb the spread of the Si Hulk group<sup>341</sup>. About 150 of Si Hulk followers were reportedly seeking asylum in New Zealand to avoid prosecution from the Malaysian government<sup>342</sup>. Previously in 2021, Melaka<sup>343</sup> and Johor<sup>344</sup> *Fatwa* committees also declared Si Hulk teachings as deviant.

In February 2023, the Johor Islamic Religious Council (MAINJ) issued a fatwa prohibiting Muslims from attending and participating in religious rituals of other faiths<sup>345</sup>. Sultan Ibrahim of Johor clarified that Muslims can still attend festivities of other faiths, provided that they do not involve religious rituals. In March of the same year, the Selangor Religious Affairs EXCO reminded the public that Muslims were prohibited from participating in any programmes at non-Muslim houses of worship, as it is an offence under the Non-Islamic Religions (Control of Propagation Among Muslims) Enactment 1988<sup>346</sup>. Any interfaith events must follow the guidelines set by the Selangor Islamic Religious Department (JAIS). The issue came under the spotlight after Projek Artikel 11<sup>347</sup> by Impact Malaysia - intended to raise awareness amongst Malaysian youth about interfaith engagement - was singled out as a platform to “proselytise Muslims”<sup>348</sup>.

The government of Malaysia has also made the effort to increase surveillance against groups that are considered to be deviant. On October 19, the Royal Police of Malaysia

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341 'JAINJ, MCMC to curb spread of Si Hulk deviant teachings' (New Straits Times, 20 July 2023)

<<https://www.nst.com.my/news/nation/2023/07/933027/jainj-mcmc-curb-sihulk-deviant-teachings>> accessed 8 November 2023

Remar Nordin, 'JAINJ to investigate spread of deviant Si Hulk teachings' (The Star, 24 July 2023)

<<https://www.thestar.com.my/news/nation/2023/07/24/jainj-to-investigate-spread-of-deviant-si-hulk-teachings>> accessed 8 November 2023

342 'Si Hulk deviant group fails in attempt to take over mosque in New Zealand' (New Straits Times, 7 August 2023)

<<https://www.nst.com.my/news/crime-courts/2023/08/939745/sihulk-deviant-group-fails-attempt-take-over-mosque-new-zealand>> accessed 8 November 2023

343 Diyanatul Atiqah Zakarya, 'Pengikut ajaran sesat Suhaini bin Mohamad lari ke New Zealand' (Kosmo!, 15 June 2023)

<<https://www.kosmo.com.my/2023/06/15/pengikut-ajaran-sesat-suhaini-bin-mohamad-lari-ke-new-zealand/#:~:text=Jawatankuasa%20Fatwa%20Negeri%20Melaka%20juga,akidah%2C%20sharia%20serta%20akhlak%20Islam>> accessed 8 November 2023

344 Fatwa Ajaran Meragukan Suhaini Mohammad (SI HULK)

[https://said.johor.gov.my/perkhidmatan/paparan\\_detail\\_fatwa.php?id=98](https://said.johor.gov.my/perkhidmatan/paparan_detail_fatwa.php?id=98)

345 'Johor fatwa prohibits Muslims from joining in 'rituals of other faiths' (Free Malaysia Today, 2 February 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/02/02/johor-fatwa-prohibits-muslims-from-joining-in-rituals-of-other-faiths/>> accessed 8 November 2023

346 'Selangor bans Muslims from attending events at churches, temples' (Free Malaysia Today, 15 March 2023).

<<https://www.freemalaysiatoday.com/category/nation/2023/03/15/selangor-bans-muslims-from-attending-events-at-churches-temples/>> accessed 8 November 2023

347 Rasyidah Zulkifli, 'Jom Ziarah Gereja sebahagian 'Projek Artikel 11' dedah belia tentang agama pelbagai kaum' (The Merdeka

Times, 14 March 2023) <<https://themerdekaitimes.com/news/2023/03/jom-ziarah-gereja-sebahagian-projek-artikel-11-dedah-belia-tentang-agama-pelbagai-kaum/>> accessed 8 November 2023

348 Iskandar Shah Mohamed, 'Selangor larang 'Projek Artikel 11 Jom Ziarah' – MAIS' (Utusan Malaysia, 17 March 2023)

<<https://www.utusan.com.my/berita/2023/03/selangor-larang-projek-artikel-11-jom-ziarah-mais/>> accessed 8 November 2023

made the commitment to monitor seven deviant groups that include Tarekat Habib Shah, Dewan Perkasa Ekonomi Islam Nusantara (DPEIN), Perjalanan Mimpi Yang Terakhir (PMYT), Millah Abraham@Ibrahim (MA), Ajaran Suhaini @ Sihulk, Nur Mutiara Mutmainnah (NMM) and The Ahmadi Religion of Peace And Light<sup>349</sup>. JAKIM has also announced that they will assign an officer to the Malaysian Communications and Multimedia Commission (MCMC) to aid in monitoring social media content pertaining to deviant teachings<sup>350</sup>.

In the most recent positive development, the Madani government has announced that the Interfaith Harmony Committee (Harmony Committee) will be reactivated<sup>351</sup>. The committee will act as a medium of discussion between religious leaders to resolve any issues pertaining to religion and race in Malaysia. Established on August 14, 2020, Harmoni replaced the Committee to Promote Inter-Religious Harmony and Understanding Among Religious Adherents (JKMPKA). Previously, the Harmony Committee faced criticism for its unbalanced representation. Out of its 18 members, a majority of 10 are Muslim, leaving only 8 representing other religions such as Christianity, Buddhism, Hinduism, Taoism, Sikhism, and Bahá'í. Another concern is that the Harmony Committee exclusively engages with Islamic affairs government institutions and the Ministry of Unity, resulting in decision-making biased toward Muslims due to their majority representation in the government.

In October, the Committee convened for the first time in 2023<sup>352</sup>. The recent developments show promising changes in the composition of the Harmony Committee. The composition of the Committee is made of representatives from government (3 seats), Islam (10 seats), Buddhism (4 seats), Christianity (4 seats), Hinduism (2 seats), Taoism (2 seats), Sikhism (1 seat), Baha'i (1 seat) and Sarawak-based Unit for Other Religions (UNIFOR) (1 seat). The number includes the co-chair, National Unity Minister Aaron Ago Dagang and Minister in the Prime Minister's Department (Islamic Affairs) Mohd Na'im Mokhtar. However, the Committee is expected to meet twice a year or as necessary. PKR deputy secretary-general Sathia Prakash Nadarajan urged the Committee to be more active, as issues between religions are complex and sensitive<sup>353</sup>.

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349 'IGP: Police monitoring deviant groups in Malaysia' (The Borneo Post, 19 October 2023)

<<https://www.theborneopost.com/2023/10/19/igp-police-monitoring-deviant-groups-in-malaysia/>> accessed 1 March 2024

350 'Jakim to place cadre officer at MCMC to monitor postings on deviant teachings' (The Star, 21 July 2023)

<<https://www.thestar.com.my/news/nation/2023/07/21/jakim-to-place-cadre-officer-at-mcmc-to-monitor-postings-on-deviant-teachings>> accessed 1 March 2024

351 'Interfaith harmony committee to be reactivated, says religious affairs minister' (Malaysia Now, 30 August 2023)

<<https://www.malaysianow.com/news/2023/08/30/interfaith-harmony-committee-to-be-reactivated-says-religious-affairs-minister>> accessed 1 March 2024

352 'Jawatankuasa Keharmonian Antara Penganut Agama bermesyuarat kali pertama' (Berita Harian, 28 October 2023)

<<https://www.bharian.com.my/berita/nasional/2023/10/1170360/jawatankuasa-keharmonian-antara-penganut-agama-bermesyuarat-kali>> accessed 1 March 2024

353 B Nantha Kumar, 'PKR leader: Interfaith harmony committee needs to be more active' (Malaysiakini, 31 December 2023)

<<https://www.malaysiakini.com/news/691753>> accessed 1 March 2024

There are a total of 342 provisions in Sharia law and fatwas that criminalise religious minorities, leading to a dogmatic environment that permits only one form of Islam and leaves no room for other religious denominations<sup>354</sup>. As a consequence, interfaith programs, designed to foster social cohesion and harmony among all races and religions, have regrettably come under scrutiny. The scrutiny directed towards interfaith programs reflects broader tensions within society, where the rights and freedoms of religious minorities are often marginalised or disregarded in favour of maintaining a homogenous religious identity. Despite the noble intentions behind interfaith initiatives, the pervasive influence of laws and fatwas criminalising religious minorities perpetuates a culture of intolerance and exclusion. Ultimately, this hinders efforts towards genuine interreligious dialogue and cooperation. Amidst these challenges, the reactivation of the Interfaith Harmony Committee signals a positive step towards fostering dialogue and addressing issues of religious diversity and representation.

### Other Issues

The Federal Court has made a landmark ruling on the unconstitutionality of 16 provisions of the Kelantan Syariah Criminal Code Enactment 2019<sup>355</sup>. Two Muslim lawyers, Nik Elin Zurina Nik Abdul Rashid and her daughter Tengku Yasmin Nastasha Tengku Abdul Rahman argued that the 16 challenged provisions that include punishments for incest, gambling, necrophilia, sodomy and sexual harassment were invalid as they are already covered by the federal law. They further contended that the authority to legislate on criminal issues rests with Parliament, asserting that state assemblies possess only the jurisdiction to enact laws related to the Islamic faith. The case affirms the position of the Federal Constitution as the supreme law of the land and has the power to overturn conflicting laws<sup>356</sup>.

Even though the case is about the technicalities of the law, sentiments that Islam and Syariah Court's power are now under threats continue to persist on social media. Groups like Parti Islam Se-Malaysia (PAS), the Islamic Party, have managed to mobilise their supporters to participate in campaigns<sup>357</sup> and rallies<sup>358</sup>. Wan Ahmad Fayhsal, a PAS youth Member of Parliament, intensified the matter by claiming there was an effort to secularise

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354 INITIATE.MY, 'Database on Malaysian Laws That Impact Freedom of Religion and Belief (FoRB)' <<https://initiate.my/freedom-of-religion-and-belief/>> accessed 8 November 2023

355R, Rahim, 'Detractors purposely missing the point, Nik Elin's daughter says of 'vitriol' following apex court ruling' (The Star, 12 February 2024) <[https://www.thestar.com.my/news/nation/2024/02/12/detractors-purposely-missing-the-point-nik-elin039s-daughter-says-of-039vitriol039-following-apex-court-ruling#:~:text=On%20Friday%20\(Feb%209\)%2C,were%20federal%20laws%20covering%20those](https://www.thestar.com.my/news/nation/2024/02/12/detractors-purposely-missing-the-point-nik-elin039s-daughter-says-of-039vitriol039-following-apex-court-ruling#:~:text=On%20Friday%20(Feb%209)%2C,were%20federal%20laws%20covering%20those)> accessed 1 March 2024

356 'Apex court has power to overturn conflicting laws' (The Star, 12 February 2024)

<<https://www.thestar.com.my/news/nation/2024/02/12/apex-court-has-power-to-overturn-conflicting-laws>> accessed 1 March 2024

357 Source:

[https://www.tiktok.com/@utehempiregold/video/7334688221181283586?is\\_from\\_webapp=1&web\\_id=7335496655430829569](https://www.tiktok.com/@utehempiregold/video/7334688221181283586?is_from_webapp=1&web_id=7335496655430829569)

358 Justin Zack, 'Crowd gathers for prayer at Putrajaya as court to decide on challenge against syariah law' (The Star, 9 February 2024)

<<https://www.thestar.com.my/news/nation/2024/02/09/crowd-gathers-for-prayer-at-putrajaya-as-court-to-decide-on-challenge-against-syariah-law>> accessed 1 March 2024

Muslim life in Malaysia<sup>359</sup>. In extension to this, Nik Elin and her daughter have also confirmed that following the decision of the apex court, they have been receiving death threats on social media<sup>360</sup>.

The case followed the precedent set in *Iki Putra Bin Mubarrak V Kerajaan Negeri Selangor*<sup>361</sup>. The plaintiff was charged for attempting to commit sexual intercourse against the order of nature with certain other male persons under Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995. The Federal court declared that the provision unconstitutional as it overlaps with Section Section 377 and 377A of the Penal Code on buggery and carnal intercourse against the order of nature.

In another case, an employee was sacked for wearing a cross at work at a Chinese Muslim eatery in Bukit Bintang<sup>362</sup>. He was unfairly dismissed for wearing a Christian symbol, following the social media buzz questioning the halal status of the eatery over the hiring of a non-Muslim staff member. In October 2023, a restaurant in Damansara received a spotlight for selling Nasi Kandar Babi or mixed rice with pork. The Malaysian Muslim Restaurant Owners Association (Presma) took issue with the restaurant as they claimed, it will cause a confusion amongst Muslims as Nasi Kandar is often sold at halal certified eateries and cooked by Mamaks who professed Islam<sup>363</sup>. The stall owner clarified that the Nasi Kandar Babi will only be sold to non-Muslims and it will not cause confusion as the restaurant displayed big non-halal signs and pork symbols (Disney's Pumba) at their signage.

In February 2023, the Court of Appeal ruled that the Pahang government's requirement that all business premises must use Jawi in their signage was constitutional<sup>364</sup>. The three-member judge ruled that the use of Jawi script did not infringe Article 5 of the Federal Constitution, which concerns the liberty of a person or Article 8, which concerns equality under the Federal Constitution. Jehan and Dana Palan, together with Phang Long Yen (now deceased), sought a judicial review application in 2020 to challenge the order by the Kuantan Municipal Council and the Pahang government. In February 2024, the Perlis government also enforced the Jawi scripts on signboards for business premises<sup>365</sup>. Other

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359 Source: <https://twitter.com/wanfayhsal/status/1755861744520704256?s=20>

360 'Death threats: Nik Elin Zurina lodges three police reports' (Astro Awani, 12 February 2024) <<https://www.astroawani.com/berita-malaysia/death-threats-nik-elin-zurina-lodges-three-police-reports-457871>> accessed 1 March 2024

361 *Iki Putra Bin Mubarrak V Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323

362 'A roasting for Muslim eatery that sacked cross-wearing employee' (Free Malaysia Today, 19 November 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/11/19/a-roasting-for-muslim-eatery-which-sacked-cross-wearing-employee/>> accessed 1 March 2024

363 'Ex-S'gor exco: 'Nasi kandar babi confusing Muslims' claim illogical' (Malaysiakini, 31 October 2023) <<https://www.malaysiakini.com/news/684830>> accessed 1 March 2024

364 Nurbaiti Hamdan, 'Pahang's Jawi script requirement does not contravene Federal Constitution, rules Appeals Court' (The Star, 16 February 2023) <<https://www.thestar.com.my/news/nation/2023/02/16/pahang039s-jawi-script-requirement-does-not-contravene-federal-constitution-rules-appeals-court>> accessed 1 March 2024

365 Aizat Sharif, 'Perlis to enforce Jawi writing on signboards beginning Feb' (New Straits Times, 10 January 2023) <<https://www.nst.com.my/news/nation/2024/01/999340/perlis-enforce-jawi-writing-signboards-beginning-feb-1>> accessed 1 March 2024

than Perlis and Pahang, Kelantan, Kedah and Melaka have already taken the initiative to use Jawi writing on business sign boards and advertising billboards.

Several cases to renounce Islam have also been recorded throughout the year. In July 2023, a 26-year-old woman aimed to renounce Islam following a failed relationship with her intended husband<sup>366</sup>. Initially, she converted to Islam to marry her then-boyfriend, a Malay Muslim back in 2017. However, their relationship ended before the wedding and she desired to return to Christianity. She sought a declaration that the Syariah Courts lack the authority under the Administration of Islamic Law (Federal Territories) Act 1993 to revoke her Muslim status. Instead, she argues that the Registrar of Muallaf (ROM), responsible for overseeing Muslim converts, should handle such matters. Her application was rejected in September, the court held that the judicial review pertaining to her conversion falls within the Syariah Courts<sup>367</sup>.

In August, The Penang High Court denied a Muslim convert's legal attempt to obtain official recognition for her reversion to Christianity following her divorce from a Muslim man in 2013<sup>368</sup>. In September, a High Court in Kuching considered a woman's plea for the right to decide her teenage son's religion and upbringing, as he currently has a Muslim name on his MyKad. She was seeking a court order to compel the National Registration Department to update her son's MyKad to reflect his Buddhist faith<sup>369</sup>. In October, a 45-year-old man sought a judicial review from the High Court to leave Islam after his marriage to a Muslim woman crumbled<sup>370</sup>. His application was rejected since the civil court had no jurisdiction on the issue of renunciation. In February 2024, the Federal Court dismissed a 34-year-old woman's appeal to challenge the Syariah Court's decision denying her the right to renounce Islam due to jurisdictional issues<sup>371</sup>.

In January, two Selangor-born sisters, aged 20 and 21, won a court declaration affirming their Hindu identity after the National Registration Department (NRD) insisted they were Muslims since their grandmother was a Muslim. Despite being born to Malaysian parents, the NRD demanded their religion be changed from Hindu to Muslim on their identity

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366 R Loheswar, 'Woman who embraced Islam for boyfriend now seeking return to Christianity to know if High Court will hear her case on Sept 21' (Malay Mail, 26 July 2023) <<https://www.malaymail.com/news/malaysia/2023/07/26/woman-who-embraced-islam-for-boyfriend-now-seeking-return-to-christianity-to-know-if-high-court-will-hear-her-case-on-sept-21/81815>> accessed 1 March 2024

367 c, 'Bid to renounce Islam: Civil court denies Eurasian's appeal' (Malaysiakini, 28 August 2023)

<[https://www.malaysiakini.com/news/677165#friendshare-link-N\\_ysRajig-42a2eaf5d4e53b6f13bf10b7610433c7-2a8b6402635c14d87c3469209250dbdbi55](https://www.malaysiakini.com/news/677165#friendshare-link-N_ysRajig-42a2eaf5d4e53b6f13bf10b7610433c7-2a8b6402635c14d87c3469209250dbdbi55)> accessed 1 March 2024

368 Ida Lim, 'Woman convert fails to get High Court leave in bid to be declared Christian after divorcing Muslim man' (Malay Mail, 4 August 2023) <<https://www.malaymail.com/news/malaysia/2023/08/04/woman-convert-fails-to-get-high-court-leave-in-bid-to-be-declared-christian-after-divorcing-muslim-man/83477>> accessed 1 March 2024

369 'Kuching High Court to hear woman's application to determine religion, upbringing of teen son' (Malay Mail, 7 September 2023) <<https://www.malaymail.com/news/malaysia/2023/09/07/kuching-high-court-to-hear-womans-application-to-determine-religion-upbringing-of-teen-son/89506>> accessed 1 March 2024

370 Hidir Reduan Abdul Rashid, 'Civil court bins man's bid to leave Islam after marriage crumbled' (Malaysiakini, 4 October 2023) <<https://www.malaysiakini.com/news/681471>> accessed 1 March 2024

371 'Woman fails in bid to renounce Islam' (The Star, 5 February 2024)

<<https://www.thestar.com.my/news/nation/2024/02/05/woman-fails-in-bid-to-renounce-islam>> accessed 1 March 2024

cards. The court ruled in favour of the sisters, declaring them as Hindus and ordering the NRD to issue identity cards reflecting their true religious status<sup>372</sup>. The series of cases involving individuals seeking to renounce Islam and affirm their religious identity underscore the intricate interplay between personal beliefs and legal frameworks in Malaysia. Each case reflects unique circumstances, highlighting the complexity of navigating religious autonomy within a diverse societal landscape.

## Recommendations

1. **Provide clear guidelines that define the boundaries of acceptable speech and hate speech.** These guidelines should be formulated through a collaborative process involving representatives from diverse religious communities, legal experts, and human rights advocates to ensure inclusivity and fairness. By clearly outlining what constitutes acceptable discourse and what crosses the line into hate speech, these guidelines can provide clarity for both individuals and law enforcement agencies, thus minimising the risk of arbitrary or discriminatory enforcement. Moreover, any efforts to criminalise hate speech should be grounded in internationally recognized principles such as those outlined in the Rabat Plan of Action.
2. **Enhancing the quality of interracial, interfaith and intrafaith engagements.** Interracial, interfaith, and intrafaith engagements in social and creative activities, such as group conversations, dialogues, arts, sports, and cultural exchanges, should aim to transcend mere sharing of common values and cultural experiences. It is imperative that the design and facilitation of these engagements address complex issues such as racism, socioeconomic inequality, and persecution faced by individuals or groups due to their exercise of freedom of religion and freedom of expression. In addition, these engagements must strive to be inclusive by involving diverse audiences from both majority and minority communities, as well as including local leaders, women, youth, and family members. By honestly confronting these crosscutting issues and ensuring diverse representation, these engagements can foster greater understanding, empathy, and unity within society, promoting social cohesion and harmony.
3. **Formulate fatwas that promote tolerance and prevent violence.** It is essential to underscore the influential role that fatwas hold within religious communities and their potential to shape individual beliefs and societal attitudes. Instead of curbing religious freedom, fatwas should be formulated with a primary focus on fostering tolerance, understanding, and peaceful coexistence among diverse religious and cultural groups. Fatwas should explicitly denounce any form of discrimination, persecution, or violence perpetrated in the name of religion, while promoting the values of compassion, empathy, and mutual respect.
4. **Revisit existing laws to ensure adequate protection of individuals against intrusive moral policing practices.** It is imperative to ensure that public officials in Malaysia receive comprehensive training on respecting and upholding individual rights, including the rights to privacy, expression, and personal autonomy. This training should include sessions on the legal frameworks that protect these rights, as well as

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372 Ida Lim, 'Court rules two Selangor sisters were never Muslims, orders NRD to issue MyKads with 'Hindu' status' (Malay Mail, 12 January 2024) <<https://www.malaymail.com/news/malaysia/2024/01/12/court-rules-two-selangor-sisters-were-never-muslims-orders-nrd-to-issue-mykads-with-hindu-status/111960>> accessed 1 March 2024

practical scenarios to enhance officers' understanding of how to apply these principles in real-life situations. Clear guidelines should be established to delineate appropriate conduct for government servants when dealing with matters of personal morality, emphasising the importance of respecting the privacy and dignity of individuals.



**CORRUPTION  
AND GOVERNANCE**

# CORRUPTION AND GOVERNANCE

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The intersection between anti-corruption efforts and good governance with the promotion, protection, and enjoyment of human rights (particularly the full realisation of economic, social, and cultural rights<sup>373</sup>) is well-recognised under international human rights law, yet not often considered when analysing the human rights situation in Malaysia.

Corruption is a well-known concept without a singular uniform definition, as it may occur both in the public and private sector and varies widely in terms of degree, ranging from individual instances of under the table “*duit kopi*” (“coffee money”) bribe payments to cultures of impunity entrenched within entire governments which facilitate the misappropriation of public funds. The only binding international anti-corruption instrument, the United Nations Convention against Corruption (UNCAC), itself does not stipulate a general definition of corruption. Instead, it sets out specific acts of corruption (such as bribery of public officials and persons in the private sector, embezzlement, abuse of functions, and illicit enrichment) which States Parties are expected to criminalise in their respective jurisdictions. In Malaysia, many of these offences are found under criminal statutes such as the Malaysian Anti-Corruption Commission Act 2009, the Penal Code, and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

As the UN High Commissioner for Human Rights has recognised, “corruption [undermines] the capacity of States to protect and fulfil their human rights obligations, more specifically the obligation to take steps, to the maximum of available resources, with a view to achieving progressively the full realization of economic, social and cultural rights, and “could lead to discrimination and [violates] the principle of equality.”<sup>374</sup> Within the context of this Chapter, it is useful to think of corruption in two forms:

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373 See Committee on Economic, Social and Cultural Rights General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (23 June 2017), available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2017-state-obligations-context>, Human Rights Council resolution 47/7, The negative impact of corruption on the enjoyment of human rights, A/HRC/RES/47/7 (26 July 2021), available at <[undocs.org/en/A/HRC/RES/47/7](https://undocs.org/en/A/HRC/RES/47/7)>; and Human Rights Council resolution 51/5, The role of good governance in the promotion and protection of human rights, A/HRC/RES/51/5 (12 October 2022), available at <[undocs.org/en/A/HRC/RES/51/5](https://undocs.org/en/A/HRC/RES/51/5)>

374 UN High Commissioner for Human Rights on Best practices to counter the negative impact of corruption on the enjoyment of all human rights, A/HRC/32/22 (15 April 2016), available at <[undocs.org/en/A/HRC/32/22](https://undocs.org/en/A/HRC/32/22)>, para 129

1. petty acts of corruption which occur at the individual level (such as the payment of bribes to obtain unfair advantages), which may result in violations of principles of equality, non-discrimination, or the right to a fair trial<sup>375</sup>; and
2. grand corruption (which involves abuse of high-level power and vast sums of money, creating widespread societal harm), which may result in a government's inability to fully realise various economic, social, and cultural rights due to the ensuing lack of resources<sup>376</sup>.

Good governance is another broadly undefined term which generally refers to a set of government policies, systems, and structures that prioritise the rule of law and human rights in the performance of public functions and delivery of public services. The former UN Commission on Human Rights has noted that foundational elements of good governance include transparency, responsibility, accountability, public participation, and responsiveness to the needs and aspirations of the people, and that this foundation is indispensable for the promotion of human rights<sup>377</sup>. The UN Human Rights Council has also recognized the normative role played by international human rights laws to provide “a set of standards to guide governing processes and to assess performance outcomes”, thereby stressing the necessity of good governance to establish and maintain an environment conducive to the promotion and protection of human rights<sup>378</sup>.

In short, given that governments hold the ultimate responsibility for safeguarding the rights of those who live within their jurisdiction, the full enjoyment of human rights is wholly dependent upon the existence of effective, accountable, and transparent public institutions and public service delivery systems. The occurrence of human rights violations are therefore symptoms of broader institutional failures that impair the government's ability or willingness to govern in a manner consistent with a rights-based approach. Following the 15th General Election (GE15) in November 2022, which saw a Pakatan Harapan and Barisan Nasional coalition government coming into power, Prime Minister Anwar Ibrahim pledged to make tackling corruption and promoting good governance core focus areas of his administration moving forward<sup>379</sup>, suggesting a welcome shift in Malaysian politics. However, the progress of the “Madani Government” towards accomplishing these lofty goals in 2023 has been middling, with several baffling

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375 See International Council on Human Rights Policy (2009), *Corruption and Human Rights: Making the Connection*. Versoix, Switzerland, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551222](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222)>; and Transparency International and Equal Rights Trust (2021), *Defying Exclusion*, available at <<https://www.transparency.org/en/publications/defying-exclusion-corruption-discrimination>>

376 See International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection*, 2009. Versoix, Switzerland, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551222](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222)>

377 UN Commission on Human Rights, Commission on Human Rights resolution 2000/64 The role of good governance in the promotion of human rights, 27 April 2000, E/CN.4/RES/2000/64, available at <<https://www.refworld.org/docid/3b00f28414.html>>

378 UN Human Rights Council resolution 51/5, The role of good governance in the promotion and protection of human rights, A/HRC/RES/51/5 (12 October 2022), available at <[undocs.org/en/A/HRC/RES/51/5](https://undocs.org/en/A/HRC/RES/51/5)>

379 Su-Lin Tan, “Malaysia’s new prime minister Anwar Ibrahim vows to unify the country and fight corruption”, (CNBC, 25 November 2022) <<https://www.cnn.com/2022/11/25/malaysia-s-new-pm-anwar-ibrahim-vows-to-unify-country-fight-corruption.html>> accessed 27 October 2023

decisions calling into question this administration's commitment to those stated goals, as this chapter will demonstrate.

## 1.0. National Anti-Corruption Policies

The erstwhile National Anti-Corruption Plan 2019-2023 (NACP) introduced under the first Pakatan Harapan government – a comprehensive set of reforms and policies targeted at creating a corruption-free nation through measures such as increasing the credibility of public institutions and efficiency in public service delivery – has ostensibly been largely unfulfilled due to the political instability of the past few years. Former Deputy Minister in the Prime Minister's Department (Law and Institutional Reform) Ramkarpal Singh stated in Parliament on 24th October 2023 that up until the second quarter of 2023, a total of 68 of the 111 NACP initiatives (or 61%) had been implemented. Further, he noted that the government was optimistic that a total of 91% could be implemented by December 2023<sup>380</sup>. This 91% figure has also been echoed by the Malaysian Anti-Corruption Commission (MACC) – which acts as the coordinating and implementing body for the NACP after it absorbed the functions of the former National Centre for Governance, Integrity and Anti-Corruption (GIACC). However, the manner in which these initiatives have been implemented and their degree of efficacy is still largely unknown.

In 2023, the Prime Minister's Office has also announced the continuation of the NACP with a new national-level plan termed the National Anti-Corruption Strategies 2024-2029 (NACS)<sup>381</sup> as a continuation of the NACP which ended in 2023. Few details have been released as to the specifics of the NACS, with Ramkarpal noting that 10 initiatives are planned specifically focused on constitutional amendments and the introduction of new laws but omitting to provide any further details on what these amendments and laws shall be<sup>382</sup>. Chief Commissioner of the MACC Azam Baki subsequently divulged that the NACS shall be launched in mid-2024 and that it would have a greater focus on the effectiveness of corruption prevention measures and improving good governance and integrity in the administration of the public service and government-linked companies<sup>383</sup>. Yet, without further details, it is impossible to know whether the direction the NACS takes will be a productive one.

### Recommendations

Greater transparency is needed to critically evaluate the implementation of NACP initiatives moving forward, especially those which have not been fully implemented

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380 Penyata Rasmi Dewan Rakyat, 24.10.2023, pp. 31 - 32. Available at <<https://www.parlimen.gov.my/files/hindex/pdf/DR-24102023.pdf>>

381 'Govt to issue guidelines on 'support letters' to prevent power abuse, says PMO' (The Star, 6 July 2023) <<https://www.thestar.com.my/news/2023/07/06/govt-to-issue-guidelines-on-039support-letters039-to-prevent-power-abuse-says-pmo>> accessed 27 October 2023

382 Penyata Rasmi Dewan Rakyat, 24.10.2023, p. 32. Available at <<https://www.parlimen.gov.my/files/hindex/pdf/DR-24102023.pdf>>

383 'SPRM akan lancar NACS 2024-2029 pertengahan tahun depan' (Astro Awani, 16 November 2023) <<https://www.astroawani.com/berita-dunia/sprm-akan-lancar-nacs-20242029-pertengahan-tahun-depan-446305>> accessed 6 February 2024

by the time the NACS is launched. The Prime Minister's Department previously published the Progress Reports for 2019 and 2020-21, as well as a Mid-Term Review in 2021<sup>384</sup>, which set out clear and thorough timelines, summarised explanations, and easy-to-understand graphics pertaining to the status of implementation for various initiatives.

Since then, no further progress reports have been released publicly, which complicates the ability to objectively evaluate the government's performance<sup>385</sup>. Thus, it is recommended that:

- The government continue with its commendable prior practice of publicly releasing clear and transparent reports regarding the implementation status of remaining NACP initiatives as well as NACS initiatives once the policy comes into effect, in order to uphold transparency, public participation and principles of open government.
- Civil society should be involved in the development of the NACS to ensure that a holistic and well-crafted anti-corruption policy is created with the input of all relevant stakeholders.
- The NACS must incorporate a holistic approach to combating corruption, taking into account all tangential factors which would impede the culture of impunity which presently thrives within the bureaucracy, e.g., increased protection of whistleblowers and human rights defenders, greater transparency and the right to access of government information.

## 2.0. Institutional Oversight

Over the years, various institutions have been established in order to carry out oversight functions on a variety of thematic areas, including:

- The Malaysian Anti-Corruption Commission (MACC), tasked with detecting and investigating corruption offences;
- The Human Rights Commission of Malaysia (SUHAKAM), tasked with protecting and promoting human rights and investigating infringements thereto (*refer to the chapter on SUHAKAM for developments in 2023*);
- The Enforcement Agency Integrity Commission (EAIC), tasked with investigating misconduct committed by officers of specific enforcement agencies listed under the Schedule to the EAIC Act 2009, e.g., the Immigration Department, the Royal Customs Department, and the National Registration Department;
- The Independent Police Conduct Commission (IPCC), tasked with receiving and investigating complaints of misconduct against members of the police force (*refer to the chapter on Right to Justice for developments in 2023*); and

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384 All the reports mentioned are available on the website of the National Governance Planning Division of the MACC:

<<https://bpgn.sprm.gov.my/my/dasar/nacp/>>

385 Based on a telephone conversation with an officer of the National Governance Planning Division of the MACC (which monitors and coordinates implementation of NACP initiatives) on 13 February 2024, the 2022 Progress Report has not been authorised for public dissemination yet and is still undergoing revisions.

- The Public Complaints Bureau (PCB), which serves as a monitoring body to ensure complaints of maladministration are resolved appropriately by relevant government departments and agencies.

A continuing concern with these institutions is that appointments of commissioners are generally placed under the discretion of the Prime Minister, which inherently creates the potential for bias and improper considerations to be involved in the decision-making process. The MACC, in particular, has faced considerable scrutiny in 2023, largely due to the extension of Chief Commissioner Azam Baki's tenure for another year despite allegations of misconduct involving a share trading controversy and his usage of Strategic Litigation against Public Participation (SLAPP) to silence journalistic reporting<sup>386</sup>. After significant backlash, PM Anwar responded by stating that his decision to retain Azam was made in order to change the convention that new leaders would be appointed once a new Prime Minister comes into power. He also added that the government would consider placing the MACC under Parliament and for the appointment of the Chief Commissioner to be decided upon by a parliamentary committee. The Prime Minister, however, went on to say that these proposals "must first be studied by the Attorney-General's Chambers and other government agencies before being further deliberated by a parliamentary committee"<sup>387</sup>.

Furthermore, a MACC probe in April 2022 into Justice Nazlan Ghazali – who convicted and sentenced former PM Najib Razak in the SRC trial at the High Court – was found by the Federal Court to have been done without compliance with proper protocol<sup>388</sup>. In a unanimous decision by the seven-person bench, the Court opined that the investigations commenced against Justice Nazlan were done "without regard to judicial independence" and had "curious timing" which cast doubt upon the *bona fides* of the exercise<sup>389</sup>. The Court also reaffirmed that "criminal investigative bodies are Executive bodies and thus investigations into judges can amount to judicial interference."<sup>390</sup>

The PCB stands apart from the other institutions mentioned, as it is not established by way of statute but by administrative circulars issued by the Prime Minister's Department<sup>391</sup>. This makes the PCB especially vulnerable to undue influence by the

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386 R. Loheswar, 'How the Azam Baki share saga unfolded' (Malay Mail, 14 January 2022)

<<https://www.malaymail.com/news/malaysia/2022/01/14/how-the-azam-baki-share-saga-unfolded/203501>> accessed 27 October 2023

387 Predeep Nambiar, 'Anwar tells why he retained Azam Baki as MACC chief' (Free Malaysia Today, 28 March 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/03/28/anwar-tells-why-he-retained-azam-baki-as-macc-chief>> accessed 27 October 2023

388 Hidir Reduan Abdul Rashid, 'MACC probe against SRC judge not properly done: CJ' (Malaysiakini, 24 February 2023)

<<https://www.malaysiakini.com/news/656227>> accessed 27 October 2023

389 Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors [2023] 3 CLJ 653 (FC), paras. [84] – [86]

390 Ibid, para. [72]

391 The current applicable circular is the Prime Minister's Department General Circular No. 2/2022 on the Improvement of Handling Public Complaints

Executive, as every aspect of its structure, jurisdiction and powers are susceptible to alteration by the government of the day at any given time. A key reform championed by the Government in 2023 was the establishment of an Ombudsman to replace the PCB as a federal statutory body tasked with managing and investigating complaints against the public service. The Ombudsman Bill was initially slated to be tabled in Parliament in October 2023<sup>392</sup> after several consultation sessions with relevant stakeholders. However, on 18 September 2023, the Minister in the Prime Minister's Department (Law and Institutional Reform) Azalina Othman stated in the Dewan Rakyat (the House of Representatives) that the scope, function, and role of the body had to be reevaluated due to similarities and redundancies with other oversight agencies, such as the EAIC<sup>393</sup> – thereby indicating that the Bill would be delayed.

### **Recommendations**

The ability for these oversight institutions to act as effective checks upon the Executive is wholly dependent on their autonomy. Without clear structural and functional separation, members of the Executive shall be empowered to act with impunity - creating opportunities for human rights violations to be committed with no tangible consequences. Therefore, it is imperative that the independence and autonomous functioning of those who lead and staff these institutions is protected. In this regard, it is recommended that:

- Appointments to oversight institutions are taken out of the unilateral discretion of the Executive and placed under independent control, such as under the purview of a Parliamentary Select Committee;
- The appointment process is democratised in accordance with international best practices, such as by implementing open calls and requiring parliamentary votes;
- The relevant governing statutes are amended to ensure oversight institutions possess sufficiently strong powers and the authority to independently initiate investigations and, where appropriate, to enforce recommendations stemming from the findings of their investigations.

Regarding the PCB and the proposed Ombudsman, it is commendable for an independent body to take over the management of complaints against the public service. Given that the public service is ultimately responsible for the implementation of government policy and the provision of public services, it is the point of contact for individuals who seek government services. As such, there is a pressing need for adequate grievance procedures to be implemented in the event of failures or inadequacies in the provision of such services, so that an effective right of remedy may be obtained.

Although no concrete plan has been released yet regarding the structure and functions of the Ombudsman, it is recommended that the body is established in accordance with international best practices and granted sufficient powers and

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392'Ombudsman Malaysia to replace, improve functions of PCB' (Malaysiakini, 14 June 2023)

<<https://www.malaysiakini.com/news/668694>> accessed 27 October 2023

393 Penyata Rasmi Dewan Rakyat, 18.09.2023, p. 12. Available at <<https://www.parlimen.gov.my/files/hindex/pdf/DR-18092023.pdf>>

authority to adequately investigate the complaints it receives. In particular, the application of the Official Secrets Act 1972 must be taken into consideration – the Ombudsman should not be disallowed from accessing documents or information purely on the grounds of it being declared an “official secret”<sup>394</sup>.

### 3.0. Other Legislative Reforms

Other legislative reforms which the Government has signalled interest in pursuing in 2023 include amendments to the Whistleblower Protection Act 2010 (such as fine-tuning legal definitions under the Act and introducing an internal complaint mechanism), as well as legislation aimed at ameliorating leakage and wastage of public funds such as the Government Procurement Act and the Fiscal Responsibility Act<sup>395</sup>. Details of the amendments to the Whistleblower Protection Act and the new Government Procurement Act have yet to be released to the public, hence it is too early to determine whether they will be drafted in a manner sufficiently comprehensive to achieve the intended goals. Both reforms are integral to the protection of human rights in Malaysia: the former must be enacted to better protect the safety and security of those who speak out against governmental wrongdoing, whereas the latter is key in ensuring that public funds are used for the adequate provision of public services and infrastructure (instead of being siphoned into private pockets).

However, the Public Finance and Fiscal Responsibility Act 2023 was passed by the Dewan Rakyat in October 2023, and clearly stipulates that government fiscal policy must be formulated and implemented in line with the general principles of accountability, responsibility, transparency, and intergenerational equity<sup>396</sup>. This Act places significant duties upon the Minister of Finance to ensure compliance with the Act<sup>397</sup>, and requires the publication of various reports, documents, and statements (such as mid-year expenditure performance reports, fiscal risk statements and tax expenditure statements) to uphold transparency in the management of public funds<sup>398</sup>.

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394 For more detailed recommendations regarding the proposed Ombudsman office, see Center to Combat Corruption and Cronyism (2024), Structuring the Malaysian Ombudsman Office, available at <[www.c4center.org](http://www.c4center.org)>

395 Ragananthini Vethasalam, Rahimy Rahim, Gerard Gimino and Teh Athira Yusof, ‘Fiscal Responsibility Act, Procurement Act expected to be tabled by year-end’ (The Star, 13 June 2023) <<https://www.thestar.com.my/news/nation/2023/06/13/fiscal-responsibility-act-procurement-act-expected-to-be-tabled-by-year-end>> accessed 27 October 2023

396 Public Finance and Fiscal Responsibility Bill 2023 (D.R. 34/2023), Sections 5 and 6, available at <<https://www.parlimen.gov.my/files/billindex/pdf/2023/DR/DR%2034%20-%20BI.pdf>>

397 Ibid, Sections 12, 15, 19, and 21.

398 Ibid, Sections 32 - 38

These, coupled with clear medium-term targets<sup>399</sup>, seem to present a promising picture for the near future<sup>400</sup>.

The regulation of political financing has been a long-standing reform agenda which is aimed at controlling sources of funding received by political parties and figures through greater transparency and disclosure requirements. Strong calls for a political financing law re-emerged in 2023 in light of high-profile investigations into former Prime Minister Muhyiddin Yassin and his party Parti Pribumi Bersatu Malaysia for various allegations of embezzlement and graft<sup>401</sup>. In early 2023, Azalina stated that the Government would prioritise revisions to bankruptcy laws to help Malaysians, instead of political financing laws which were allegedly more pressing during elections and should have been passed prior to GE15<sup>402</sup>. However, during her September 18th speech in the Dewan Rakyat, Azalina announced that the Cabinet had agreed to refer the Political Financing Bill to the Parliamentary Special Select Committee (PSSC) on Human Rights, Elections, and Institutional Reforms, suggesting that the Bill was at an advanced stage of development. In the same speech, Azalina also outlined seven considerations for the basic provisions in the Bill, including that control of political financing would not be limited only to election periods, no form of political contribution from foreign entities would be allowed, and that there would be set limits for contributions allowed for any political party or individual politician<sup>403</sup>.

In response to Azalina's statements in Parliament, the All-Party Parliamentary Group Malaysia (APPGM) on Political Financing called for a clear timeline for the tabling of the Political Financing Bill in Parliament and noted that the crucial element of public funding was not mentioned. Public funding of political parties involves allocation of monies from the national budget to finance political parties; a system which may "encourage equality between political parties and reduce dependence on private donors."<sup>404</sup> Subsequently in November 2023, the APPGM published its draft Political

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399 Soo Wern Jun, 'In a first for the country, Public Finance and Fiscal Responsibility Act passed in Dewan Rakyat' (Malay Mail, 11 October 2023) <<https://www.malaymail.com/news/malaysia/2023/10/11/in-a-first-for-the-country-public-finance-and-fiscal-responsibility-act-passed-in-dewan-rakyat/95694>> accessed 27 October 2023

400 "IDEAS: Public Finance and Fiscal Responsibility Act a welcome start; regular review required for meaningful impact" (IDEAS, 13 October 2023) <<https://www.ideas.org.my/ideas-public-finance-and-fiscal-responsibility-act-a-welcome-start-regular-review-required-for-meaningful-impact>> accessed 27 October 2023

401 Isabelle Liew, 'Malaysia's anti-graft agency probes former PM Muhyiddin over \$92m in 'political funds'' (The Straits Times, 15 February 2023) <<https://www.straitstimes.com/asia/se-asia/malaysia-s-anti-graft-agency-probes-former-pm-muhyiddin-over-91m-in-political-funds>> accessed 27 October 2023

402 Ida Lim, 'Azalina: Political funding laws should have come in before GE15, focus now on bankruptcy law reforms' (Malay Mail, 15 March 2023) <<https://www.malaymail.com/news/malaysia/2023/03/15/azalina-political-funding-laws-should-have-come-in-before-ge15-focus-now-on-bankruptcy-law-reforms/59650>> accessed 27 October 2023

403 Penyata Rasmi Dewan Rakyat, 18.09.2023, p. 6. Available at <<https://www.parlimen.gov.my/files/index/pdf/DR-18092023.pdf>>

404 Amalia Azmi, "APPGM calls for clear timeline on Political Financing Bill, emphasises the need for public funding" (New Straits Times, 19 September 2023) <<https://www.nst.com.my/news/nation/2023/09/957286/appgm-calls-clear-timeline-political-financing-bill-emphasises-need>> accessed 6 February 2024

Financing Bill which incorporates *inter alia* a proposal for a Political Party Fund drawn from monies appropriated by Parliament<sup>405</sup>.

### Recommendations

Many of the aforementioned reforms have been repeatedly called for by civil society over the past few years, hence it is incumbent upon the government to expedite the passing of these laws while ensuring that all relevant stakeholders (including civil society) are consulted during the drafting process. In summary:

- The Government Procurement Act must set out clear guidelines for procurement processes, with limits on the power of ministers to direct decision-making and transparency of relevant information in an easily accessible format;
- The Whistleblower Protection Act must be amended to expand whistleblowing avenues by allowing disclosures to be made to non-enforcement agencies without affecting the protections granted to whistleblowers, reviewing all laws which restrict disclosure of classified information (such as the Official Secrets Act 1972 and Section 203A of the Penal Code); and
- The Political Financing Act should incorporate key proposals issued by civil society in addition to those enumerated by Azalina on 18 September 2023, including the possibility for public funding of political parties.

#### 4.0. Parliamentary Oversight

As one of the three branches of government under the traditional doctrine of separation of powers, the Legislature is meant to act as an important oversight mechanism upon the Executive in a similar manner as the Judiciary. However, successive ruling governments over the last few decades have continuously defanged Parliament, resulting in the institution losing much of its potential oversight capacity today. The Anwar administration seems to have recognised this in 2023, with the Dewan Negara (the Senate) President Wan Junaidi explaining that the Government presently plans to reintroduce the Parliamentary Service Act<sup>406</sup>. The previous Parliamentary Service Act 1963 was the basis for a Parliamentary Service separate from the general public service of the Federation, which allowed Parliament to act autonomously in managing its own affairs pertaining to staffing. However, this Act was repealed in 1992 and Parliament was effectively placed under the administrative control of the Executive to this day.

Additionally, 10 Parliamentary Special Select Committees (PSSCs) were established in March 2023 on a variety of thematic areas, including finance and economy, health,

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405 IDEAS, "APPGM on Political Financing releases its updated Political Financing Bill to the public" (IDEAS, 9 November 2023) <<https://www.ideas.org.my/appgm-on-political-financing-releases-its-updated-political-financing-bill-to-the-public>> accessed 6 February 2024

406 "Parliamentary Services Act re-introduction process now in second stage, says Wan Junaidi" (The Star, 29 August 2023) <<https://www.thestar.com.my/news/nation/2023/08/29/parliamentary-services-act-re-introduction-process-now-in-second-stage-says-wan-junaidi>> accessed 6 February 2024

and human rights and institutional reforms<sup>407</sup>. These PSSCs – created under Standing Order 81 of the Dewan Rakyat – are bipartisan entities made up of sitting MPs and are meant to act as check and balance mechanisms upon the relevant ministries. The introduction of these thematic PSSCs is another example of how the Government intends to utilise parliamentary processes as key accountability mechanisms, thereby democratising the process of Executive oversight. However, it must be noted that unlike Parliamentary Select Committees which exist permanently (such as the Public Accounts Committee) due to their entrenched position in the Standing Orders, the continued existence of these PSSCs is not guaranteed once this parliamentary term expires. Thus, if the next Government does not hold the same priorities and concerns as this one, this important avenue of oversight may be lost.

Other examples of how the role of Parliament as a check on the Executive seems to have been strengthened in 2023 include the tabling and debate of SUHAKAM's 2020 Annual Report<sup>408</sup> and the Auditor-General's Report 2021<sup>409</sup> in the Dewan Rakyat. In the case of the latter, the motion was strongly opposed by members of the Opposition bench, who argued that Speaker Johari Ghani's decision to allow the debate was unprecedented. However, the Speaker's steadfast commitment to an open debate set an extremely important precedent for key reports on the performance of the Government to be discussed by elected representatives on behalf of the electorate before the entire nation. This decision, made through the exercise of his residuary powers under Standing Order 100 of the Standing Orders of the Dewan Rakyat<sup>410</sup>, is a vital example of the way discretion should be exercised in the public interest – given that the relevant governing legislation generally only provides for the reports to be laid before or submitted to Parliament<sup>411</sup>. It is indicative of a growing understanding of the importance of public participation and transparency in matters of governance which has extended across the various branches of Government.

## Recommendations

Many of the important accountability measures taken in Parliament in 2023 are of an ad-hoc nature and are dependent on the discretion of the government of the day. Therefore, it is imperative that these measures are entrenched as soon as possible to

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407 Gerard Gimino, Martin Carvalho and Tarrence Tan, "Dewan Rakyat sets up ten bipartisan Special Parliamentary Select Committees" (The Star, 21 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/21/dewan-rakyat-sets-up-ten-bipartisan-special-parliamentary-select-committees>> accessed 6 February 2024

408 'Issues raised in Suhakam report will be addressed, says Azalina' (The Star, 13 June 2023) <<https://www.thestar.com.my/news/nation/2023/06/13/issues-raised-in-suhakam-report-will-be-addressed-says-azalina>> accessed 27 October 2023

409 Soo Wern Jun and Shathana Kasinathan, "Auditor-General Report 2021 to be debated today, Dewan Rakyat Speaker declares after furore from Opposition" (Malay Mail, 6 June 2023) <<https://www.malaymail.com/news/malaysia/2023/06/06/auditor-general-report-2021-to-be-debated-today-dewan-rakyat-speaker-declares-after-furore-from-opposition/72813>> accessed 6 February 2024

410 Ibid

411 See Article 107(1) of the Federal Constitution and Section 9 of the Audit Act 1972 regarding the Auditor-General's Report, and Section 21 of the Human Rights Commission of Malaysia Act 1999 for SUHAKAM's Reports

defend our democracy against more authoritarian leadership. In particular, it is recommended that:

- The re-introduction of the Parliamentary Service should be expedited in order to empower Parliament as an autonomous institution once more;
- The establishment of thematic PSSCs should be incorporated into the Standing Orders of the Dewan Rakyat, so that their existence shall be consistent even after the end of a particular parliamentary term; and
- The requirement for debates to be held on the annual reports of key oversight institutions should be statutorily mandated, instead of the current legal requirements only being limited to these reports being tabled or laid before the Dewan Rakyat.

## 5.0. Separation of the Attorney-General and Public Prosecutor's Offices

The separation of the offices of the Attorney-General (AG) and the Public Prosecutor (PP) was also a salient topic of discussion in 2023 due to several questionable decisions involving high-profile prosecutions, including the failure to file the notice of appeal in time in respect of Najib Razak's and Arul Kanda Kandasamy's acquittal for charges of tampering with the Auditor General's report on 1Malaysia Development Berhad (1MDB) at the Court of Appeal (resulting in their acquittals at the High Court standing unchallenged)<sup>412</sup>, Muhyiddin Yassin's discharge and acquittal on the charges linked to the Jana Wibawa scandal due to defective charges framed by the prosecution<sup>413</sup>, and the application for a discharge not amounting to an acquittal (DNAA) for Deputy PM Zahid Hamidi in his Yayasan Akalbudi case<sup>414</sup>. PM Anwar has affirmed his administration's commitment to the proposal, but qualified the statement by saying that the reform would involve time and cost to be implemented<sup>415</sup>. Recently, Azalina explained in Parliament that the government remained committed to institutional reforms such as the separation of the AG and PP's offices, and that the Cabinet had agreed to a detailed and holistic empirical study on the matter, taking legal and financial implications into account<sup>416</sup>. It must be noted that public scrutiny and

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412 Noor Azlida Alimin, 'Pinda laporan audit 1MDB: Najib, Arul Kanda bebas sepenuhnya' (Sinar Harian, 12 September 2023) <<https://www.sinarharian.com.my/article/278509/berita/semasa/pinda-laporan-audit-1mdb-najib-arul-bebas-sepenuhnya>> accessed 27 October 2023

413 Iylia Marsya Iskandar, 'Muhyiddin's acquittal does not translate to innocence, say legal experts' (New Straits Times, 16 August 2023) <<https://www.nst.com.my/news/nation/2023/08/943649/muhyiddins-acquittal-does-not-translate-innocence-say-legal-experts>> accessed 27 October 2023

414 Tarrance Tan, 'We never 'withdrew' case against Zahid, DNAA followed due process, says AGC' (The Star, 8 September 2023) <<https://www.thestar.com.my/news/nation/2023/09/08/we-never-039withdrew039-case-against-zahid-dnaa-followed-due-process-says-agc>> accessed 27 October 2023

415 Adib Povera, 'PM reaffirms commitment to separation of powers between AG and PP' (New Straits Times, 8 September 2023) <<https://www.nst.com.my/news/nation/2023/09/952737/pm-reaffirms-commitment-separation-powers-between-ag-and-pp>> accessed 27 October 2023

416 Penyata Rasmi Dewan Rakyat, 09.10.2023, pp. 12 - 13. Available at <<https://www.parlimen.gov.my/files/hindex/pdf/DR-09102023.pdf>>

criticism of decisions of this sort is unavoidable until and unless prosecutorial power is divested from the AG, who is a key part of the Government of the day and thus is inherently susceptible to political influences and considerations.

For further on this topic, see the following chapter “The Judiciary Review”.

### **Recommendations**

Calls for the separation of the AG and PP’s offices have been longstanding, and the Government must expedite efforts to implement this reform in order to prevent further erosion of faith in the integrity of the national criminal justice system.

## **6.0. Government-Linked Companies (GLCs) and the Private Sector**

Political appointments to the boards of government-linked companies (GLCs) and statutory bodies have also continued under this administration, despite what seemed to be an initial attempt to dismantle political patronage by sacking all chairpersons and board members of GLCs and statutory bodies in late 2022<sup>417</sup>. The use of such appointments as a bid to shore up political support has been a long-standing feature of Malaysian politics; an approach clearly still favoured by some parties in light of former PM Muhyiddin Yassin’s stated plans to appoint politicians to GLC boards if his coalition came to power in the 2023 state elections<sup>418</sup>. PM Anwar has alleged that those appointed to these positions do possess suitable qualifications<sup>419</sup>. However, the continued lack of transparency in the appointment process gives rise to the potential for these positions to be used to perpetuate patronage, instead of being in the best interests of the companies/bodies. For instance, the appointments of UMNO politicians Asyraf Wajdi Dusuki and Ahmad Jazlan Yaakob as the Chairman of Majlis Amanah Rakyat (MARA) and FELCRA Bhd respectively have been criticised as potentially being motivated by a desire to strengthen internal party support due to the timing of the decisions (during UMNO party elections and leading up to the state elections)<sup>420</sup>, whereas the appointments of former Inspector-General of Police Acryl Sani and former AG Idrus Harun as Chairmen of Perbadanan Usahawan Nasional

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417 Syed Jaymal Zahiid, ‘Anwar administration terminates all GLC political appointments with immediate effect’ (Malay Mail, 15 December 2022) <<https://www.malaymail.com/news/malaysia/2022/12/15/anwar-administration-terminates-all-glc-political-appointments-with-immediate-effect/45412>> accessed 27 October 2023

418 R Loheswar, ‘GLCs aren’t ‘ATMs’ for political parties to give as reward for election support, Bersih tells Muhyiddin’ (Malay Mail, 1 July 2023) <<https://www.malaymail.com/news/malaysia/2023/07/01/glcs-arent-atms-for-political-parties-to-give-as-reward-for-election-support-bersih-tells-muhyiddin/77333>> accessed 27 October 2023

419 ‘Some political appointments at government-linked companies to be reviewed: Malaysia PM Anwar’ (Channel News Asia, 11 April 2023) <<https://www.channelnewsasia.com/asia/malaysia-anwar-ibrahim-political-appointment-glc-review-3409571>> accessed 27 October 2023

420 Irfan Faruqi, ‘BERSIH kecam lantikan Pengerusi GLC, gesa reformasi disegerakan’ (Astro Awani, 20 March 2023) <<https://www.astroawani.com/berita-politik/bersih-kecam-lantikan-pengerusi-glc-gesa-reformasi-disegerakan-411657>> accessed 27 October 2023

Bhd<sup>421</sup> and Amanah Raya Bhd<sup>422</sup> respectively are illustrative of the “revolving door” concept, where individuals rotate between the public and private sectors while maintaining the influence and interests of each position.

### **Recommendations**

The practice of political appointments to GLCs goes against the principles of good governance and the right to equality in terms of opportunity, and therefore must be reevaluated to prioritise merit instead. In a similar manner as oversight bodies stated above, it is recommended that the appointment process be made more open and transparent, with the introduction of open calls, to ensure that the most qualified persons are selected for these positions.

### **7.0. Conclusion**

In summary, the Anwar administration has shown some indication that it genuinely intends to tackle corruption and promote good governance by committing to various legislative and institutional reforms. Although not much has materialised in this regard, it is better to call for well-crafted reform plans - which would necessitate a longer time to create - instead of half-baked and rushed proposals to be bulldozed purely for the sake of presenting a progressive image. This Government must ensure that political considerations do not supersede its commitment to professed ideals, lest it lose sight of the fundamental principles which brought it to power in the first place.

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421 'Ex-IGP Acryl Sani named PUNB chairman' (The Star, 1 September 2023)

<<https://www.thestar.com.my/news/nation/2023/09/01/ex-igp-acryl-sani-named-punb-chairman>> accessed 27 October 2023

422 Alzahrin Alias, 'Idrus Harun dilantik jadi Pengerusi AmanahRaya' (Berita Harian, 10 October 2023)

<<https://www.bharian.com.my/bisnes/korporat/2023/10/1163170/idrus-harun-dilantik-jadi-pengerusi-amanahraya>> accessed 27 October 2023



THE JUDICIARY  
REVIEW

# THE JUDICIARY REVIEW

*Author: Andrew Khoo*

In the words of the Oath of Office and Allegiance set out in the Sixth Schedule to the Federal Constitution, judges of the superior courts (the Federal Court, Court of Appeal and High Court) either “swear or affirm that [they] will faithfully discharge [their] judicial duties in that office to the best of [their] ability, that [they] will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.”

In this review of the Malaysian Judiciary, we will consider selected issues and see how well it has done in 2023.

## **The Courts and the Powers of the Attorney General**

Arguably, the most pressing issue on the Malaysian legal horizon in the last few years has been the role of the Attorney General. Article 145(2) of the Federal Constitution states:

*“It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters...as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.”*

Article 145(3) of the Federal Constitution goes on to state that:

*“The Attorney General shall have power, exercisable at his discretion, to initiate, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.”*

This is further fleshed out in the Criminal Procedure Code. Section 376(1) states:

*“The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.”*

In other words, the Attorney General acts as the legal advisor to the Yang di-Pertuan Agong and to the Cabinet. At the same time, he holds the power of prosecution for offences. For some years now, especially since the 1Malaysia Development Berhad (1MDB) scandal came to light, there have been calls for these dual roles of the Attorney General to be separated, in order for the executive not to be involved in prosecutorial decisions. This is especially since, under Article 145(1) of the Federal Constitution:

*“The Yang di-Pertuan Agong shall, on the advice of the Prime Minister, appoint a person who is qualified to be a judge of the Federal Court to be the Attorney General for the Federation.”*

Imagine then the predicament of an Attorney General, appointed on the advice of the Prime Minister, having to decide whether or not to charge that very same Prime Minister for having allegedly committed a criminal offence, especially after the 15<sup>th</sup> General Election of November 2022. In the course of the last few years, in several high-profile prosecutions

of leading politicians, charges were dropped, and the prosecution applied for and was granted a discharge not amounting to an acquittal (“DNAA”). Among the most recent examples of this was Deputy Prime Minister Zahid Hamidi, who was granted a DNAA after 47 breaches of trust, corruption, and anti-money laundering charges in relation to funds belonging to Yayasan Akalbudi were dropped on 4 September 2023. This was given even though the trial had already commenced, with many witnesses having already testified.

Increasing distrust in our institutions has led to these decisions being viewed as having been made in order to save political allies, and not for purely legal reasons, if at all. The fact is that another politician belonging to one of the parties in government was also granted a DNAA in 2023 in respect of a charge of sexually assaulting a woman<sup>423</sup>.

These cases clearly prompt the question as to whether there is a possibility of requiring the prosecution to explain the reasons for withdrawing a prosecution and requesting a DNAA. While the courts have suggested that they have no choice but to grant a DNAA if it has been requested by the Attorney General or the prosecution, is this view entirely correct or necessarily correct? On the one hand, in a case in 2022, the High Court in Kuantan ruled that an appeal against an acquittal by the prosecution should nonetheless proceed notwithstanding that the prosecution had withdrawn the appeal<sup>424</sup>. However, this decision was reversed by the Court of Appeal when it heard the case in March 2023. The Court of Appeal once again referred to Article 145(3) of the Federal Constitution and to the discretion of the Attorney General.

However, in the same case, the Court of Appeal did acknowledge that the discretion of the Attorney General was not unfettered and could be reviewed in certain circumstances. This was in line with a Federal Court decision in 2021, which reversed the Attorney General’s decision to pursue a prosecution<sup>425</sup>. Does it also apply in a case where the Attorney General decides NOT to pursue a prosecution?

Soon after the DNAA was granted in the Zahid Hamidi case, the Malaysian Bar Council announced that it had filed for judicial review of that decision<sup>426</sup>. It remains to be seen whether the courts will take this matter up, or instead simply affirm a long line of cases that have ruled that the discretion of the Attorney General prevails. This case would be an opportunity to bring clarity to the matter and possibly strengthen public confidence in the Malaysian judiciary in Malaysia, by showing that the courts will not merely sit idly by

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423 ‘Amanah leader facing sexual assault charge granted DNAA’ (Malaysia Now, 7 September 2023)

<<https://www.malaysianow.com/news/2023/09/07/amanah-leader-facing-sexual-assault-charge-granted-dnaa>> accessed 19 February 2024

424 V Anbalagan, ‘AG has discretion in conduct of criminal trials, says Court of Appeal’ (Free Malaysia Today, 30 March 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/03/30/ag-has-discretion-in-conduct-of-criminal-trials-says-court-of-appeal/>> accessed 19 February 2024

425 See Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri Malaysia & Ors [2021] 5 MLJ 209

426 ‘Malaysian Bar files judicial review of Zahid’s DNAA’ (The Star, 4 December 2023)

<<https://www.thestar.com.my/news/nation/2023/12/04/malaysian-bar-files-judicial-review-of-zahids-dnaa>> accessed 19 February 2024

when the Attorney General decides not to pursue or continue a prosecution. Public confidence in the judiciary will be boosted if it is seen to be accountable for its decisions and, equally importantly, if it is prepared to hold other branches of government openly accountable for their decisions. If the Malaysian judiciary is seeking an opportunity to debunk the popular perception, however misplaced it may be, and however much the judiciary itself may have contributed to it, that its hands are tied once the Attorney General or the prosecution exercises its discretion not to proceed with a case, and applies for a DNAA which must then be granted, this would certainly be the case to watch in 2024.

### **Is Malaysia a Secular State?**

The debate as to whether Malaysia is a secular state, an Islamic state, or some hybrid entity, continued in 2023. In the main, this was played out in the public arena, and between competing political parties and divergent philosophical persuasions.

However, several legal cases that were brought before the Malaysian courts required constitutional interpretations that went to the very core of this debate.

The first was the challenge by the mother-and-daughter pair of Nik Elin Zurina Nik Abdul Rashid and Tengku Yasmin Nastasha Tengku Abdul Rahman against 18 provisions of the Kelantan Syariah Criminal Code Enactment (I) 2019 that was heard in the Federal Court on 19 November 2023. The plaintiffs alleged that these provisions exceed the scope of the power to make laws by the Kelantan state legislative assembly as they encroach into the area of criminal law reserved for the federal government pursuant to the Ninth Schedule, List I of the Federal Constitution. Judgment on this matter was reserved, and a decision would be forthcoming in 2024<sup>427</sup>.

This case came in the wake of two similar cases, one each in 2021 and 2022, involving Syariah criminal legislation passed by the Selangor State Legislative Assembly, which also dealt with the issue of overlapping jurisdiction over certain criminal laws and the concept of judicial review<sup>428</sup>. In both those cases, the challenged Syariah criminal provisions were declared to be unconstitutional. One of the cases also upheld the principle that judicial review was a function of the civil courts, by virtue of the Federal Constitution, and not within the jurisdiction of the Syariah court system.

The second was the saga of Loh Siew Hong, a single mother whose three children had been unilaterally converted to Islam by her now ex-husband. In May 2023, the High Court ruled against her application for the conversion of her children to the religion of Islam to be reversed<sup>429</sup>. The High Court held that as there was no indication that the children had

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427 Rahmat Khairulrijal, 'Federal Court reserves judgment on constitutional challenge against Kelantan Syariah law' (New Straits Times, 20 November 2023) <<https://www.nst.com.my/news/crime-courts/2023/11/980332/federal-court-reserves%C2%A0judgment-constitutional-challenge-against>> accessed 19 February 2024

428 Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323 and SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356

429 Predeep Nambiar, 'Loh Siew Hong loses bid to quash kids' conversion to Islam' (Free Malaysia Today, 11 May 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/05/11/loh-siew-hong-loses-bid-to-quash-kids-conversion-to-islam/>> accessed 19 February 2024

ceased to practice the religion of Islam, there was no need to reverse their conversion. This decision went against the doctrine of *stare decisis*, or precedent, in that earlier cases, and in particular the *Indira Gandhi case*<sup>430</sup>, had clearly laid down the principle that the unilateral conversion of a child to another religion, without the consent of both parents, was unconstitutional. The decision was appealed against and would be heard in 2024.

Loh's struggle on behalf of her children had begun in 2019 when her then husband took their three children away. He converted to Islam and unilaterally converted their three children as well. It took her until 2022 to regain sole custody of the three children. However, in February 2023 the Court of Appeal allowed the Perlis Islamic Religious and Malay Customs Council to intervene in the matter for the purpose of varying the custody order granted to Loh, on the basis that Loh was not a Muslim, but the three children were, and that they were in need of some form of care from a Muslim body<sup>431</sup>. The case was then remitted to the High Court for further hearing. Fortunately for Loh, the High Court ruled in her favour by declining to vary the custody hearing, holding that the legal position was as stated in the case of *Indira Gandhi*, in which situation Loh should have sole custody in the best interest of the children. In any event, the judge presiding over the case had stated that the children, having been interviewed by her, had expressed their desire not to remain as Muslims<sup>432</sup>.

In March 2023, *Indira Gandhi* herself returned to court together with 13 other plaintiffs to challenge provisions in eight state Islamic enactments that allow for unilateral conversion to Islam<sup>433</sup>. The 14 plaintiffs are challenging the laws in the states of Johor, Kedah, Melaka, Negeri Sembilan, Pahang, Perak, Perlis and the Federal Territories. They are seeking a declaration that these provisions are unconstitutional. In October 2023, the court allowed two state religious bodies, that of Johor and the Federal Territories, to intervene in the matter<sup>434</sup>. No date has been publicly announced for the hearing as yet.

What do these three cases say about whether or not Malaysia is a secular state? Interestingly, the Chief Justice of the Federal Court in the *Nik Elin* case chided the

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430 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545

431 Kenneth Tee, 'Perlis Islamic council gets green light to intervene in Hindu mum Loh Siew Hong's custody order for unilaterally converted children' (Malay Mail, 7 February 2023)

<<https://www.malaymail.com/news/malaysia/2023/02/07/perlis-islamic-council-gets-green-light-to-intervene-in-hindu-mum-loh-siew-hongs-custody-order-for-unilaterally-converted-children/53788>> accessed 19 February 2024

432 V Anbalagan, 'MAIPs' bid to vary custody order of Loh's Muslim children dismissed' (Free Malaysia Today, 11 October 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/10/11/maips-bid-to-vary-custody-order-of-lohs-muslim-children-dismissed/>> accessed on 19 February 2024

433 Nurbaiti Hamdan, 'M. Indira Gandhi and 13 other plaintiffs file legal challenge against unilateral conversion' (The Star, 20 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/20/m-indira-gandhi-and-13-other-plaintiffs-file-legal-challenge-against-unilateral-conversion>> accessed 19 February 2024

434 'Court allows Islamic councils to intervene in bid against unilateral conversion' (Free Malaysia Today, 23 November 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/10/23/court-allows-islamic-councils-to-intervene-in-bid-against-unilateral-conversion/>> accessed 19 February 2024

counsel for one of the state religious bodies for making uncalled-for statements alleging that this case spelt the death-knell for the Syariah court in Malaysia. The Chief Justice clarified that the issue in this particular case was not about undermining the position of Islam or of the Syariah court in Malaysia. Instead, it was about the competency of the Kelantan State Legislative Assembly to enact the provisions in question. The Chief Justice cautioned those involved in the case against disseminating distorted information about the issue before the court.

In response to the Nik Elin case, proponents of the strengthening of the Syariah court system like the Muslim Lawyers Association of Malaysia have supported initiatives to look into empowering and elevating the status of the Syariah court<sup>435</sup>. The million-ringgit question is whether this can be achieved within the current wording of the Federal Constitution, or whether amendments to the Federal Constitution would be required. If the latter, would such amendments fundamentally alter the framework of the Federal Constitution as envisaged by the drafters of the Federal Constitution. From a legal and judicial perspective, introducing amendments to the Federal Constitution that would fundamentally alter its framework would raise the argument of possible violation of the basic structure doctrine. This is the legal understanding that the Federal Constitution has certain essential features which cannot be changed, even in a situation where the amendment had been passed by the requisite majority in Parliament and agreed to by the requisite consenting parties such as the Conference of Rulers. The Federal Court seems divided on this issue, with some judges in favour of the doctrine while others demur.

The conclusion for the present moment appears to be that while “Islam is the religion of the Federation”, the criminal legal system is clearly within the jurisdiction of the Federal Government, as is responsibility for all the other matters set out in the Ninth Schedule, List I of the Federal Constitution. The sphere of legislative responsibility for the states is as set out in the Ninth Schedule, List II of the Federal Constitution, with the areas of concurrent jurisdiction to be found in the Ninth Schedule, List III of the Federal Constitution. If all parties were to keep within the prescribed scope of their respective legislative responsibility and competence, there would be fewer occasions for jurisdictional and constitutional conflicts.

### **Other Notable Issues**

On 15 December 2023, a pre-Merdeka law that punishes men who entice married women away from their husbands - section 498 of the Penal Code - was unanimously ruled by the Federal Court to be unconstitutional, in that it unlawfully discriminates on the grounds of gender, thereby violating Article 8(2) of the Federal Constitution. Further, the very idea that a married woman is somehow akin to a property that can be taken away or stolen from another man, is both patriarchal and condescending.

Finally, any review of 2023 would be incomplete without mentioning the case of *Haris Fathillah bin Mohamed Ibrahim v Tan Sri Dato' Sri Hj Azam bin Baki*<sup>436</sup>, an important case in

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435 'Hasten setting up Syariah Court empowerment committee' (Malaysiakini, 23 November 2023)

<<https://m.malaysiakini.com/news/687613>> accessed 4 March 2024

436 *Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin Baki & Ors* [2023] 2 MLJ 296

the area of independence of the judiciary. This was a challenge to the powers of the Malaysian Anti-Corruption Agency (MACC) to investigate a sitting judge on allegations of corruption. In this case, the Federal Court held that while the law did allow for the MACC to investigate a member of the judiciary for corruption, the doctrine of the separation of powers meant that the Chief Justice needed to be apprised of the allegations and that the member of the judiciary in question would first have to be suspended from duties before investigations could commence. The judiciary had its own disciplinary procedures and code of judicial ethics, which were in effect to ensure that the judiciary remained independent and free from external influence.

The case also touched on the issue of ouster clauses, and reaffirmed the decisions of the Federal Court that ruled them to be unconstitutional<sup>437</sup>. Such clauses are incompatible with the principles of the rule of law, as they undermine the essential requirement of accountability on the part of discretion-exercisers and administrative decision-makers. They are also unconstitutional because ouster clauses violate the principle of the separation of powers by restricting the judiciary from exercising its crucial role in holding in check decisions made by the executive and legislative branches of government. Whether or not the principle of separation of powers itself is enshrined in the Federal Constitution takes us back to the question of the basic structure doctrine.

The judiciary would do well to continue to uphold the independence of the judiciary by ensuring, on pain of being found in contempt of court, that court orders are strictly and promptly complied with by parties that come before it. In particular, no government ministry, department or agency should be permitted to disregard the orders or instructions of the court. They should also invoke their inherent and continuing jurisdiction to monitor compliance with their orders and instructions, in order to promote the rule of law and the administration of justice. This is not judicial activism but mere adherence to judicial decisions.

## Conclusion

We began this Judiciary Review by mentioning the oath of office taken by judges. As a former Court of Appeal judge wrote in 2023:

“Constitutional oath jurisprudence in Malaysia is derived from the oath of office taken by judges who swear to “preserve, protect and defend the constitution” without breaching social justice obligations, as mandated in many parts of the constitution, such as in Articles 3, 4, 5, 8, 12 and 121.....when it comes to constitutional amendments, the oath of office

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<sup>437</sup> See the cases of *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320 and *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356. Tribute should be paid here to Haris Ibrahim, who was himself an advocate and solicitor and a fierce fighter for justice and the rule of law. He saw fit to courageously challenge this unwarranted incursion into the independence of the judiciary, for which he was a firm defender. Sadly, for Malaysia, Haris Ibrahim passed away on 5 August 2023. He will be missed.

gives judges constitutional power to strike down the amendment if it breaches any of the constitutional provisions or its framework<sup>438</sup>.”

We continue to look to the institution of the judiciary to be the guardian of the legal and constitutional rights of all, both Malaysians and non-citizens, as envisaged by the Federal Constitution.

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438 'The application of 'basic structure' jurisprudence in Malaysia' (Free Malaysia Today, 7 August 2023)

<<https://www.freemalaysiatoday.com/category/opinion/2023/08/07/the-application-of-basic-structure-jurisprudence-in-malaysia/>>  
accessed 4 March 2024



MIGRANTS AND  
REFUGEES

# MIGRANTS AND REFUGEES

*Author: Adrian Pereira*

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## **Global Measurement and Standard Setting Frameworks Impacting Domestic Policy Reforms**

The measurement of human rights in Malaysia has been commonly based on UN standards, international law, extra-judicial and transnational supranational frameworks and local laws. Today we even see Multilateral and Regional Agreements like Free Trade Agreements (CPTPP, RCEP, ASEAN++) impacting and setting labour standards and protections. Malaysia has also seen the impact of the Withhold and Release Order (WRO) by the United States of Customs and Border Protection on our economy with Malaysian products like gloves and palm oil from companies found to have forced labour indicators being banned. While the standards are set in paper, the protections normally fall short based on interpretations, effectiveness, international cooperation and geopolitical positionings.

Migrant and refugee rights measurement has been a challenge as they are normally one dimensional civil and political rights driven as done using UN rights frameworks (GCM, GCR, SDG, Conventions) and seldom the response towards the social -cultural and historical developmental evolution of migrant communities in a holistic manner, taking into consideration the rights of noncitizens and citizens without reading them as being in contradiction or in competition. While most national rights frameworks are limited to prioritizing the protection of its own citizens, non-citizens should also enjoy all rights and protections regardless of citizenship status in a country. The boundary of this discourse is yet to be explored and tested in a robust manner in Malaysia. Nevertheless, the interpretation of such international laws needs to go beyond rights-based standards and perhaps be analysed via a decolonizing lens to ensure the core analysis and synthesis are rooted in the historical context of migration, with the hope we can ensure better protections for all in the future, beyond the “Us vs Them” rhetoric.

Besides the UN, there are few other prominent measurement frameworks that should be taken seriously on labour. The low ratings put Malaysia in a very precarious situation and this should be taken seriously by all actors as they are monitored by investors, supply chains and potential businesses to gauge the labour market stability and as a yardstick for good governance. Besides that, civic rights media freedoms and corruption ratings are a measurement of the good governance which has a direct impact on migration. Ratings to refer to constitute as below:

- USA TIP Report;
- ITUCS;
- Walk Free Modern-Day Slavery Index;
- Corruption Index;
- Media Freedom Reporting;

- CIVICUS Civil Rights Index

### **Domestic Policy Reform Conundrum on Migration**

The Madani Administration under Prime Minister Anwar Ibrahim<sup>439</sup> has been going back and forth with regards to reforms on labour migration, as there seems to be a lack of clarity and direction in the reforms. Amongst the most glaring flip-flops is the Madani Administration's refusal to adhere to and implement the recommendations made by the Independent Committee on Management of Foreign Workers 2018<sup>440</sup>. While the report was made public recently, labour activists have criticized the report as not being comprehensive enough to detail out the abusive mechanics and not exposing the syndicates perpetuating these abuses. And hence, genuine reforms would not be possible without detailed expose of the rot in the multiple ministry mechanism of labour migration recruitment.

We also saw major reshuffling at the political and bureaucratic levels within the Ministry of Human Recourses (MOHR). In particular, the removal of the former Human Resources Minister V. Sivakumar was shrouded with controversy, as he had been summoned by the Malaysian Anti-Corruption Commission (MACC) for questioning over alleged corruption relating to recruitment of migrant workers involving his officers<sup>441</sup>. With limited visible and proportionate action taken by the government on governance reforms within the MOHR, many questions arise on the sincerity and effectiveness of the reforms promised by the Madani Administration.

Another setback was the Madani Administration's reversal of the major policy decision to make MOHR as the primary department for labour migration management, which saw the function returned to the Ministry of Home Affairs (MOHA). The move sent a wrong message that "it is business as usual" as far as migrant worker recruitment is concerned. Activists have called out this move as detrimental to labour reforms as there would be serious conflict of interest as the issuance of work permits and labour security law enforcement are both led and conducted by the same ministry without transparent checks and balances. This raises serious governance questions as the management of migrant workers should be to maximize the economic productivity in the absence of Malaysian workers who shun 3D – dirty, dangerous and difficult - jobs.

The Malaysian government has launched various action plans like the National Action Plan on Trafficking in Persons 2021 - 2025 (NAPTIP 3.0) and the National Action Plan on Forced Labour 2021 – 2025 (NAPFL), with the proposed National Action Plan on Business and Human Rights being delayed. However, there has been little to no consolidation of these plans in consultation with the national tripartite body, the National Labour Advisory Council (NLAC), civil society, migrant communities and other relevant actors.

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439 <https://www.pmo.gov.my/2023/12/madani-concept-inclusive-to-all-races-religions-pm-anwar/>

440 [https://admin.moha.gov.my/images/maklumat\\_bahagian/IM/BPARreport\\_LATEST\\_compressed-compressed-compressed.pdf](https://admin.moha.gov.my/images/maklumat_bahagian/IM/BPARreport_LATEST_compressed-compressed-compressed.pdf)

441 Mohd Iskandar Ibrahim, 'MACC takes statement from Human Resources Minister over migrant worker recruitment case' (New Straits Times, 16 April 2023) <<https://www.nst.com.my/news/nation/2023/04/900198/macc-takes-statement-human-resources-minister-over-migrant-worker>> accessed 1 March 2024

## **Anti-Trafficking/Modern Day Slavery Reforms**

Anti-trafficking in Malaysia has been governed by the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) under the purview of the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Majlis Antipemerdagangan Orang dan Antipenyeludupan Migran, MAPO), a multi-agency council under MOHA. In 2023, MAPO has called for nominations to fill the 8 civil society organization (CSO) seats on the council as required under the amended ATIPSOM. In the past, only 3 seats were filled by CSOs. Now with the expansion to 8 seats, more participation by CSOs will hopefully transform MAPO into a more transparent and accountable agency under MOHA. Nevertheless, activists have highlighted in the past about the possible conflict of interest of having MAPO's secretariat parked under MOHA. The solution could be to transform MAPO into a full-blown statutory body, or park it under the Prime Minister's Department.

MAPO has also released its own report<sup>442</sup>, the Annual Country Report on Trafficking In Persons (1 April 2022 - 31 March 2023) with collected data as a strategy to counter the findings in the United States Department of States Trafficking in Persons Report (US TIP), and to portray Malaysia as proactively taking efforts to curb human trafficking. The report uses the USA TIP reporting template but stops short of giving specific details of prosecution which would have been a critical deterrent to human traffickers and smugglers as per "name and shame" practices. This includes failing to publish the banned lists of agents, employers, as well as public servants involved in human trafficking and migrant smuggling who have been convicted of human trafficking and forced labour.

MAPO began cooperation with selected CSOs as part of the efforts to stop human trafficking. These efforts include collaborating with thinktanks and supporting shelter homes/safe houses run by NGOs that conduct case management for victims of trafficking. MAPO also launched the One Stop Centre together with Tenaganita<sup>443</sup> as a holistic and comprehensive strategy to provide survivor-centered remedies to victims of human trafficking. Besides that, MAPO continues to collaborate with Global Shepherds, the International Justice Mission (IJM), Stop Human Trafficking (SHUT), and other like-minded CSOs to combat human trafficking.

### **Bilateral Agreement with Labour Migration: A Setback or Win-Win Solution?**

Malaysia has signed various bilateral agreements (BLAs) on labour recruitment with various countries. Amongst them are BLAs with Indonesia, Bangladesh, Nepal, Cambodia and others. As these BLAs are formulated without workers and migrants' participation, it is impossible to gauge the motivation and driving principles of such agreements and in whose benefit do they serve if not the workers themselves. Amongst the controversies that have emerged over the BLAs is the legal and the extra-territorial enforceability of the agreements. While the BLA itself is not legally binding, the standard contract that it has

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442 Report: <http://mapo.bernama.com./pdf/annualcountryreport-2023.pdf>

443 Source: <https://www.instagram.com/p/CsJC613SnKX/?next=%2Ffalessandraledin%2F&hl=ja>

proposed would be legally binding as the contract is an agreement bound by contract law and employment-related laws in Malaysia.

Civil society actors like the Migrant Workers Right to Redress Coalition (MWR2R) and the Socialist Party of Malaysia have constantly called for a Comprehensive Policy on Labour Migration<sup>444</sup> as a more holistic solution to this never-ending mess. Meanwhile, Dr Lee Hwok Aun of the ISEAS-Yusof Ishak Institute calls for a “reset of the migrant recruitment and employment system”<sup>445</sup>.

BLAs have also failed to enforce one of the fair labour recruitment principles set by the International Labour Organisation (ILO), i.e. workers shall not be charged directly or indirectly, in whole or in part, any fees or related costs for their recruitment<sup>446</sup>, popularly known as the zero-recruitment fee policy. Since 2018, the definition of what consists of recruitment fees has been made clear and the principle is now more enforceable. While the BLAs signed with Nepal, Bangladesh and Indonesia, as well as Malaysia’s NAPFL propose that no fees are charged to workers, migrant workers are still charged between USD134 to USD5000 depending on their nationality, as indicated in a report by the International Organization for Migration (IOM), *Assessment of Causes and Contributing Factors to Migrant Workers Becoming Undocumented in Malaysia*<sup>447</sup>. The Malaysian authorities attribute the failure to manage recruitment fees on their lack of extraterritorial jurisdiction to penalize actors who collect the recruitment fees back in the countries of origin.

**TABLE 12: MIGRATION COST BY NATIONALITY**

Nationality (N=40)	Migration cost (USD)
Bangladesh (13)	4,000–5,000
Nepal (19)	1,100–1,650
Indonesia (8)	134–500

444 Source: <https://nsinitiative.net/wp-content/uploads/2019/11/Comprehensive-National-Policy-on-Labour-Migration-v032019.pdf>

445 Lee Hwok Aun and Adrian Pereira. Can Malaysia eliminate forced labour by 2030? Available at: [https://www.iseas.edu.sg/wp-content/uploads/2022/11/TRS2\\_23.pdf](https://www.iseas.edu.sg/wp-content/uploads/2022/11/TRS2_23.pdf)

446 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_536755.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536755.pdf)

447 [https://www.iom.int/sites/g/files/tmzbd1486/files/documents/2023-08/english\\_undocumented-migrant-workers-report.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/documents/2023-08/english_undocumented-migrant-workers-report.pdf)

<b>Malaysian Workers vs Migrants vs Refugee Table of Discrimination</b>			
<b>Rights by Law/Regulation</b>	<b>Malaysian Workers (Contract for Service)</b>	<b>Migrant Workers (Temporary Pass Work Holders)</b>	<b>Refugees (UNCHR Card Holders)</b>
Social Protections via SOCSO/PERKESO	Full protections, during and after work related accidents	Only work-related accidents	Not permitted
EPF Contributions	Compulsory	Not Compulsory	Not permitted
HRDF Trainings and Upgrading Schemes	Enjoys trainings	Not Entitled	Not permitted
Minimum Wage	Entitled	Entitled	Not permitted
Employment Insurance Scheme (EIS)	Entitled	Not Entitled	Not permitted
Years of Work	Till retirement age	10 (+3 Extension)	No formal work allowed
Periodical Medical Checks (FOMEMA)	Not subjected	Compulsory with possibility of facing termination and deportation if detected with certain communicable or non-communicable diseases <sup>448</sup>	Not permitted
Pregnancy	Maternity and paternity leave given	Pregnant Migrant Workers will have job terminated and be deported	Not permitted
Collective Agreement	Access for both union and non-union members	Access for union members only.	Not permitted

448 <https://fomema2u.com.my/wp-content/uploads/2022/10/FOMEMA-Unsuitable-Criteria-1.pdf>

Benefits Entitlement		Must contest in IR Court if non-union member	
Union Membership	Has Access	No restriction	Not permitted
Union Leadership/Exco	Allowed	Possible but with permission by MOHR	Not permitted
Public Health Care Access	Access to Rm1 public Health Clinics	Have access but at unsubsidized rates  Subject to arrest and detention if undocumented	50% "discount" on unsubsidized rates if UNHCR Card Holder
YBGK/Public Legal Aid Fund	Has Access	No Access	Not permitted
Remand period	Max 14 days	Max 28 Days	Max 28 days
Peaceful Assembly as per Act	Yes	Excluded and denied	Excluded and denied

### Human Rights Abuses and Deaths in Custody Against Migrants

Migrant workers face extremely precarious treatment and conditions while in detention in Malaysia. Detention centres include lockups, jails, and immigration depots. Types and degrees of abuses were highlighted in SUARAM's report *Reforming Prisons and All Places of Detention Moving into the Endemic Phase in Malaysia: Challenges and Ways Forward*<sup>449</sup>.

Besides various reported abusive conditions inside the detention centres, migrants and refugees who are detained in Malaysia are excluded from the Nelson Mandela Rules in practice and protected by minimal regulation which leads to undignified treatment and torture-enabling environments. The Nelson Mandela Rules is another name for *The United Nations Standard Minimum Rules for the Treatment of Prisoners*<sup>450</sup>. As undocumented migrants do not have equal and substantial access to justice, they experience various abuses in isolated and enclosed environment where no checks and balances and

449 Report: [https://www.suaram.net/\\_files/ugd/359d16\\_70518e3853b941c697112d70bb4caa51.pdf](https://www.suaram.net/_files/ugd/359d16_70518e3853b941c697112d70bb4caa51.pdf)

450 Nelson Mandela Rules: [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf)

inspections by third parties can take place. This creates a very toxic and precarious environment with an abnormally high record of deaths in custody.

### **Deaths in Custody and Injustice to Families**

In the case of Mr. Rafi Ullah who died in the Sungai Buloh Prison, Selangor, on 7 Feb 2021, there was no inquest procedures instructed by the Attorney General into how he died in custody as of 2024. Even the family was not given the full postmortem report. Such undignified handling of prisoners who die in custody should be stopped, with rights-based Standard Operating Procedures (SOPs) to be made public and enforced for enforcement officers on duty in the detention centres. Proceedings of inquests of migrant detainees have revealed various structural and systemic shortcomings which led to the unnecessary deaths in custody.

### **Civic Freedoms/Fundamental Freedoms - A Stepping Stone to Migrant Empowerment.**

Civil rights of migrant workers continue to be violated in Malaysia. This includes the denial of freedoms of assembly, peaceful protest, strikes, expression and association, a clear violation of both the labour and social rights of migrant workers. According to the statistics (September 2023) by the Department of Trade Union Affairs (*Jabatan Hal Ehwal Kesatuan Sekerja*, JHEKS), there are about 1,008,731 trade union members in Malaysia, of whom only 34,872 (3%) are migrant workers. This means that only 1.47% of the 2.38 million documented migrant workers are union members, and that an abnormally huge percentage of migrant workers are not represented and hence do not enjoy the rights and benefits of unionism and collective bargaining.

Out of the total number of trade unions, i.e., 756, only 17 (2%) have migrant workers as members. Not being a union member exacerbates the vulnerability of migrant workers in claiming their rights. This is contrary to the principles of the ILO Decent Work Agenda which includes social dialogue as a pillar. While the Trade Unions Act 1959 does not discriminate against migrant workers' membership, permission of the Minister of Human Resources is nevertheless required for migrant workers to hold an executive position or to establish a trade union.

### **Denied Right to Peaceful Assembly and Social Dialogue**

On 2 January 2023, after a "strike" by 200 migrant workers in Bentong, Pahang, due to wage related issues, police detained 2 foreign nationals believed to be the leaders<sup>451</sup>. In addition to being excluded from the Peaceful Assembly Act 2012, non-citizens are also denied the right to gather peacefully in public or at workplaces, even if it is to make a collective claim over their rights. This has led to weakened migrant worker movement as per the ILO's Decent Work Agenda under which social dialogue and social protection are 2 key pillars.

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451 T N Alagesh, 'Bentong cops detain two foreigners for 'masterminding' strike involving 200 workers' (New Straits Times, 17 January 2023) <<https://www.nst.com.my/news/crime-courts/2023/01/870954/bentong-cops-detain-two-foreigners-masterminding-strike-involving>> accessed 1 March 2024

On 25 December 2023, it was reported that 171 Bangladeshi workers were arrested by the police for walking towards the police station in Johor to lodge a report against their employer<sup>452</sup>. Instead of helping them with their labour grievances and referring them to the Labour Department, the police handed them over to the Immigration Department for overstaying in the country under immigration law. It shows that, despite MAPO's role in facilitating inter-agency collaboration and referrals, there are gaps in enforcement which still criminalize migrant workers through no fault of their own.

On 8 February 2024, it was reported that the workers, now numbered 733, received RM1,035,557.50 – about half of the amount that they had initially filed for - in unpaid wages from their employer following mediation by the Labour Department. This averages to about RM1,412.77 per person which is less than the monthly minimum wage of RM1,500.00. Despite not being paid for more than a month and burdened by high recruitment costs that cause them to be in debt back home, this settlement could be considered as a travesty of justice on the part of the Labour Department.

This aside, it is not clear what actions were taken by MOHR to penalize the recruitment agency for bringing in workers without available jobs, although both Home Minister Saifuddin Nasution Ismail and Human Resources Minister Steven Sim said in a joint statement<sup>453</sup> that the company responsible for duping the migrant workers would be barred from applying for new migrant workers or having any transaction with the Immigration Department, including renewing the temporary working pass for existing workers.

### **Curtailed Freedom of Expression**

On 7 December 2023, a Cambodian entrepreneur Mariyah Yaakob<sup>454</sup> and her son were charged after making a video alleging that a particular ethnic group in Malaysia were lazy. Despite apologizing and saying it was a joke, she was charged under Section 505C of the Penal Code with making a statement intending to incite or which is likely to incite a community. Her son was charged under Section 233(1)(a) of the Communications and Multimedia Act 1998. Weaponizing laws to prevent migrants' freedom of speech and expression would be detrimental to their well-being and rights in Malaysia as this would create a chilling effect and deter migrants from voicing out their opinions and even demanding for their rights.

This very weak case settlement is a possible result of weak worker representation and collective action as it is understood that the workers did not have legal representation and

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452 '171 Bangladeshi men detained in Kota Tinggi' (New Straits Times, 25 December 2023) <<https://www.nst.com.my/news/crime-courts/2023/12/994060/171-bangladeshi-men-detained-kota-tinggi>> accessed 1 March 2024

453 Teh Athira Yusof, 'Govt blacklists 'dishonest' company' (The Star, 7 January 2024) <<https://www.thestar.com.my/news/nation/2024/01/07/govt-blacklists-dishonest-company>> accessed 1 March 2024

454 'Cambodian woman, son charged over 'lazy Malays' video' (Free Malaysia Today, 7 December 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/12/07/cambodian-woman-son-charged-over-lazy-malays-video/>> accessed 1 March 2024

hence have been shortchanged by the legal system. The outcome would have been very different had the worker been part of a union with competent legal representation.

### **Human Trafficking Via Job Scams**

In 2023, Malaysia was shocked with various incidents of mass numbers of migrant workers being trafficked into Malaysia via formal recruitment process. Majority of the workers were from Nepal and Bangladesh. The modus operandi is bogus employers masquerading as employment agents, giving promises of job opportunities to migrant workers and recruiting them with the help of employment agents in the countries of origin. The bogus employers would use forged documents for the recruitment process and to obtain quotas, giving rise to a situation in which migrant workers are brought into Malaysia, only to find that there are no real jobs for them. The bogus employers would then attempt to transfer the migrant workers to different employers, or simply abandon them, leaving them high and dry.

Such modus operandi, which has been going on for years, is considered a form of human trafficking as it fulfills the 3 criteria to identify human trafficking under the Palermo Protocol: 1. Activity 2. Means and 3. Purpose<sup>455</sup>. As investigative journalist from Malaysiakini uncovered<sup>456</sup>, various actors did not vet the documents used in the recruitment process and did not conduct due diligence to ensure that the jobs were real the workplace actually existed. Joseph Paul, a human rights activist from Tenaganita, questions: "What has been the role of the Foreign Workers Centralized Management System (FWCMS) in this dubious recruitment exercise? How much of the recruitment fees paid by each of these workers have gone to the coffers of the company controlling FWCMS?"<sup>457</sup>

This raises a deeper question on the governance and reforms needed for the management of labour migration. As past reports and investigations by the government have exposed irregularities in the official processes of recruitment of migrant workers, some labour rights activists have also proposed that labour migration be parked under the Prime Minister's Department. A former member of parliament, Charles Santiago, has also called for an independent investigation into the alleged existence of a migrant worker quota syndicate<sup>458</sup>. While the government has claimed on 19 October 2023 that there was an oversupply of workers<sup>459</sup>, this was rebutted by the Federation of Malaysian Manufacturers

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455 <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>

456 S Vinothaa & Ramu Sapkota, 'Migrant worker import quota won via fake deals, then traded for millions' (Malaysiakini, 22 November 2023) <<https://www.malaysiakini.com/news/687116>> accessed 1 March 2024

457 Joseph Paul, 'LETTER | Exploitation of migrant workers continues unabated' (Malaysiakini, 2 October 2023) <<https://www.malaysiakini.com/letters/681148>> accessed 1 March 2024

458 'Independent probe needed on migrant worker quota syndicate, says ex-MP' (Free Malaysia Today, 22 November 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/11/22/independent-probe-needed-on-migrant-worker-quota-syndicate-says-ex-mp/>> accessed 1 March 2024

459 Martin Carvalho, 'Huge excess of migrant labour' (The Star, 19 October 2023)

<<https://www.thestar.com.my/news/nation/2023/10/19/huge-excess-of-migrant-labour>> accessed 1 March 2024

(FMM)<sup>460</sup>, for the manufacturing sector particularly. This supply and demand mismanagement would need to be rectified and streamlined under one governing body.

In April 2023, it was reported that a group of Bangladeshi and Nepali workers were brought into Malaysia with official calling visas, but realized there were no real jobs available for them upon arrival. Their condition was worsened as they had paid high recruitment fees and were facing high interest rates to be paid back instantly. During a site “rescue” to the workers’ hostel, the best that the then Human Resources Minister V. Sivakumar could do was his proposal that the employers be charged under the Employees’ Minimum Standards of Housing, Accommodations and Amenities Act 1990 [Act 446]<sup>461</sup>.

While there were many other systemic violations committed by the employers who brought the workers in, there is no substantial action taken against them. In reality, the traffickers can be charged with various laws including ATIPSOM 2007, the Employment Act 1955, the Immigration Act 1959/1963, the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA), the Industrial Relations Act 1967 and the Companies Act 2016.

### **Non-Compliance of Workers Rights in Unionized Environments**

Under the Industrial Relations (IR) Act 1967, all workers in a working environment with a collective agreement (CA) should receive work benefits and rights according to the collective agreement. While this is clearly stated in the law, the process is not automatic as few barriers exist. First is the local unions’ refusal or reluctance to admit migrant workers into the trade union. While the Trade Unions Act 1959 does not discriminate between Malaysians and migrant workers on the right to membership, it is up to the union’s leadership and constitution to enable migrant workers to join as members. Secondly, as trade union executive committees exclude migrant workers, they are not included in the collective bargaining processes with employers. Hence, migrant workers needs are not discussed and not addressed. This leaves a vacuum of care and concern on the part of both the trade unions and employers to grant equal rights and benefits to all at the workplace. Thirdly, many migrant workers are yet to be empowered on union membership and industrial relations knowledge about receiving and claiming benefits of an existing collective agreement. They would not understand the language used in collective agreements and, hence, would not know about the benefits and social protections offered by collective agreements (CAs).

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460 Fatimah Zainal, “No oversupply of foreign workers in manufacturing” (The Star, 19 October 2023)

<<https://www.thestar.com.my/news/nation/2023/10/19/no-oversupply-of-foreign-workers-in-manufacturing>> accessed 1 March 2024

461 ‘Sivakumar: Labour Dept rescues 226 foreign workers placed in poor housing conditions in Nilai’ (Malay Mail, 10 April 2023)

<<https://www.malaymail.com/news/malaysia/2023/04/10/sivakumar-labour-dept-rescues-226-foreign-workers-placed-in-poor-housing-conditions-in-nilai/64133>> accessed 1 March 2024

## **Workers Victory over Non-Compliance of Collective Agreement Case in Food and Beverage Industry**

Also in 2023, workers from F&N Beverages Manufacturing SDN. BHD. were granted a consent award (Award No: 1387 of 2023) of RM1,171,793.90 by the Industrial Court Malaysia, Kuala Lumpur (Case No:2(1)/1-252/22). While the workers worked in a unionized environment, they were not invited or encouraged to join the trade union of this particular worksite. The union involved was the National Union of Drink Industry Workers. And hence, the workers had to file for a non-compliance case at the Industrial Court.

This case was inspired by a previous similar case against another global supply chain where in July 2020, the Industrial Court of Malaysia (CASE No.:3/1-1119/19) gave migrant workers at Goodyear Malaysia Berhad an award on the CA non-compliance case (Award No:944 of 2020) saying that the migrant workers were “entitled to the same rights, they should not be discriminated, and they are entitled to receive the benefits that are contained in the CA.”

This case set a clear precedent for migrant workers in work environments with a CA to gain rights and benefits under the CA. What MOHR and the Industrial Relations Department should do is to empower labour inspectors to enforce this right proactively, and also for MOHR to ensure a directive for all migrant workers to be given both the right to union membership and the benefits of CAs in unionized environments with CAs.

It is vitally important for MOHR to make this automatic as few migrant workers would have the resources, time and energy to file the cases in the Industrial Relations Court, the process of which can be costly and lengthy. Migrant workers who file cases also face the risk of reprisals by employers, who could either threaten to terminate the migrant workers’ contracts, or coerce them to resign before the end of their employment. Migrant workers whose contracts are terminated by the companies will have to apply for the “special pass” which gives workers monthly permission to remain in Malaysia while the court case is ongoing for a limited number of months. Nevertheless, the special pass does not automatically grant migrant worker the right to employment while the legal case is being pursued. Thus, very few migrant workers in such a situation will take their cases to court. This differs from migrant workers who have received the Protection Order under ATIPSOM and are given the freedom of mobility and the right to work.

## **Migrant Workers Win Appeal at Court of Appeal on Labour Claims Despite Not Being in the Country**

As per the Court of Appeal Malaysia (Civil Appeal No.: CB-16-2-02/2019), a group of 48 migrant workers from India were allowed to make a claim at the Labour Court for unpaid wages despite their decision to return to India. This case sets a precedent that enables migrant workers to get access to justice even if they decide to withdraw their case and return home after filing the case. While the initial case hearing at the Labour Court happened in December 2018 and the whole legal process took up to 4 years, the case’s judgement is significant as a case law that says:

*“Even if there had been a withdrawal of the complaint, the Director General of Labour may still proceed with his inquiry and make a necessary order”.*

The Court of Appeal also went on to remind the Malaysian government that;

*“The Employment Act is a social legislation and must therefore be interpreted liberally and equitably in favor of the weaker party who are the poor and likely illiterate Appellants (migrant workers) here.”*

### **Racism and Xenophobia in State-Owned Media and social media**

Various media establishments, both state and privately owned, have been found to use racist and xenophobic reporting styles, graphics and language that add to the stigmatization of migrants and refugees by Malaysians. These reports also contain fake news with direct impact on the human rights of migrants and refugees in Malaysia. This includes making the migrant and refugee communities vulnerable to vigilante groups, facing the possibility of evictions, harm towards women and children, stigma by healthcare workers and various other kinds of abuses.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) via its publication *Seven Key Elements on Building Human Rights-Based Narratives on Migrants and Migration*<sup>462</sup> says that “discrimination, xenophobia and related intolerance, hate speech and hate crime have severe impact on the human rights of migrants”. Abusive online reporting and content can lead to misinterpretation, misinformation, fake news, mistrust and many other abuses. Such terminologies and acts of malicious reporting can also lead to Malaysians causing harm to the migrant communities. It could also incite violent reaction when push comes to shove.

Tenaganita raised concern in March 2023 that “the Rohingya communities are facing harassment and confrontation from the general public following an anti-Rohingya campaign”<sup>463</sup>. Tenaganita and other civil society actors have called on the government to put an end to the anti-Rohingya campaigns online and for social media platforms to enforce their ethical standards, especially banning accounts that promote hatred and violence towards vulnerable communities.

Migrants and refugees also fell victim to hate speech even during the 15th General Election as documented and reported by The Centre for Independent Journalism (CIJ). A CIJ report, *Social Media Monitoring of Malaysia’s 15th General Election*, published in 2023, shows that “there was significant targeting of non-Malaysians on social media, with attacks on refugees and migrants reaching the highest severity level compared with the other issues that were monitored”.

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462 Report: <https://www.ohchr.org/en/documents/tools-and-resources/seven-key-elements-building-human-rights-based-narratives-migrants>

463 ‘Stop hate campaign against refugees and asylum seekers’ (Aliran, 17 March 2023) <<https://m.aliran.com/civil-society-voices/stop-hate-campaign-against-refugees-and-asylum-seekers>> Accessed 1 March 2024

## Domestic Workers

The domestic worker sector in Malaysia continues to be under-regulated and highly precarious. While the government introduced partial social protection benefits in the form of the national social security programme, SOCSO, in 2020, domestic workers, also known as domestic employees following the amendments to the Employment Act which took effect in 2023, are still excluded from Schedule 1 of the Act, as a result of which domestic workers are still denied access to fundamental standards such as the minimum wage, weekly rest day and overtime compensation.

Although social security in the form of SOCSO has been extended to domestic workers effective June 2021, there still exist limitations to their rights and wellbeing in Malaysia. Adrian Pereira (2021)<sup>464</sup> refers to domestic work in Malaysia as ‘state -sanctioned forced labour’ due to its exclusion from ‘many aspects of the law that govern labour’.

The first schedule of the Employment Act (amended in 2022) exempts ‘domestic employees’ (domestic workers) from clauses below:

- a) Hours of work
- b) Leave Entitlements
- c) Maternity Leave
- d) Paid Sick Leave

One ILO survey, conducted from July to September 2022 and published on 15 June 2023, on the conditions faced by migrant workers employed as domestic workers in three South East Asian countries<sup>465</sup> found that 30% of migrant domestic workers in Malaysia faced exploitative working conditions. The conditions experienced by domestic workers in Malaysia certainly fulfils the ILO forced labour definition, which is identified through indicators such as excessive working hours, unpaid salary and overtime, low wages, restrictive movement and being unable to resign or change their employers. Besides access to some social protection services, nothing much has changed in terms of legislation or enforcement in Malaysia. Most notably, the forced labour incidence in the same sector is far lower in Singapore and Thailand, which constitute 3 % and 7 % respectively.

According to MOHR statistics, Indonesians made up approximately 60% of the migrant domestic workers in Malaysia as of September 2023, while those from the Philippines constituted roughly 32%, with the rest from Cambodia, India, Sri Lanka, Vietnam and other countries. Domestic workers remain ununionized and unorganized, as a result of which they are without a platform to effectively represent them in work disputes and other labour violations. It is partly due to this that solidarity among domestic workers is weak, and that checks and balances to correct legal and structural issues relating to domestic work are almost non-existent. The isolated nature of the work, curtailments of the freedom of association and expression, as well as the fear of reprisals all serve as a deterrence for

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464 Refer to SUARAM’s Malaysia Human Rights Report 2022 – Migrant Rights and the COVID-19 Pandemic: [https://9276d4dd-287e-4464-bafb-a43a3fe21d36.filesusr.com/ugd/359d16\\_652d7c44f55841689970f68f0d83debd.pdf](https://9276d4dd-287e-4464-bafb-a43a3fe21d36.filesusr.com/ugd/359d16_652d7c44f55841689970f68f0d83debd.pdf)

465 Source: [https://9276d4dd-287e-4464-bafb-a43a3fe21d36.filesusr.com/ugd/359d16\\_652d7c44f55841689970f68f0d83debd.pdf](https://9276d4dd-287e-4464-bafb-a43a3fe21d36.filesusr.com/ugd/359d16_652d7c44f55841689970f68f0d83debd.pdf)

domestic workers to organize themselves and to demand for better social protection and comprehensive welfare safeguards.

Domestic work is also perceived by the public and policy makers as informal work that does not require extensive skills or knowledge. The ILO, however, challenges the fallacy through an evidence-based research that domestic workers possess skillsets that are classified by the ILO as Level Two of the International Standard Classification of Occupations (ISCO). This classification consists of technical skills as well as good transversal skills, communications and the ability to speak in the local language, to name a few.

Malaysia still refuses to ratify the ILO Domestic Workers Convention (C189<sup>466</sup>), indicating a lack of commitment to constructively deal with the aforementioned issues which perpetuate a cycle of suffering and injustice that domestic workers have been experiencing. Moreover, this has cemented Malaysia's global image of being a serial abuser of domestic worker rights.

The government's response to the lack of domestic worker protection is to enter into bilateral agreements (BLA) with various countries to meet the specific needs of each labour-sending country, taking into consideration their workers' realities. While it is argued that BLAs are not legally binding as their legal standing is equivalent to that of a Memorandum of Understanding (MOU), some of the BLAs contain standard contracts which, once signed by all parties, are legally binding. BLAs therefore do offer some standards, albeit limited.

One of the most harrowing incidents of domestic worker abuse was documented in 2018 when the case of Adelina Lisao surfaced. The Indonesian national who had reportedly been made to sleep outside the house with her employer's dogs had succumbed to injuries from the alleged abuse. In June 2022, the Federal Court however affirmed the earlier Court of Appeal's dismissal not amounting to acquittal ruling in favour of her employer. This exemplifies the reality of how these cases are resolved in Malaysia. Malaysiakini reported that since the agents involved had pleaded guilty to committing immigration offences related to Lisao's case, the defendant could go scot-free<sup>467</sup>. The deceased's relatives decided to sue the employer for negligence and breach of contract nonetheless.

On February 9, 2024, the High Court awarded the family of Lisao RM750,000 in damages<sup>468</sup>. The Judge Anand Ponnudurai ruled that the injuries sustained by the deceased and her death had been caused by the defendant, and hence categorized her negligence as a violation of human rights. While the judgement was welcomed by civil society, this

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466 [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102960](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102960)

467 S Vinothaa, 'Family to sue employers over domestic worker Adelina's death' (Malaysiakini, 6 January 2023)

<<https://www.malaysiakini.com/news/650511>> accessed 1 March 2024

468 V Anbalagan, 'Woman, daughter ordered to pay dead maid's family RM750,000 for negligence' (Free Malaysia Today, 9 February 2024) <<https://www.freemalaysiatoday.com/category/nation/2024/02/09/woman-daughter-ordered-to-pay-dead-maids-family-rm750000-for-negligence/>> accessed 1 March 2024

however harkens to the absence of a comprehensive law and policy that protect domestic workers.

The absence of a specific and separate category for caregivers and domestic workers has only worsened the magnitude of exploitation of this group of migrants. Lochna Menon of the All Women's Action Society (AWAM) said that, as the Malaysian population was aging, the government had to 'prepare more initiatives in geriatrics, healthcare and other types of care, including mental health and support services, especially for caregivers.'<sup>469</sup> If a separate labour classification and corresponding law are not formulated for caregivers, domestic workers and informal workers will continue to be exploited for doing the highly specialised caregiving work without the necessary training and benefits. This also puts migrant domestic workers at risk of falling prey to raids by enforcement units on caregiving homes and jobs related to the service.

### **Refugee Rights**

Refugee and asylum-seeker rights continue to be governed by an opaque set of rules which the government of Malaysia has deliberately kept close to its chest. Refugees and asylum-seekers are also miscategorized as potentially posing a threat to national security the National Security Council (NSC), and this has caused their communities to fear for the abuse of power by various enforcement agencies. This is demonstrated in a Hansard dated 10 August 2020, where Directive 23 of the NSC refers to the "Management Mechanism for Undocumented Migrants Holding UNCHR Cards". This, however, can be considered "ultra vires", because there is no law to govern refugees and asylum-seekers, leaving the interpretation of the directive to the enforcement authorities without guidance.

The Hansard goes on to mention the following policies on refugees and asylum-seekers:

1. They are free to move to Peninsular Malaysia unless they have violated the laws and are detained, and this is due to the government's position that the UNCHR Card is not a "valid travel document."
2. They would not be deported back to their country of origin due to the principles of "non-refoulement" unless they voluntarily choose to return. They will also have to prove that their lives are threatened back home. Nevertheless, they can be sent home if deemed a security threat to Malaysia.
3. They will get access to public health facilities with a 50% discount on expatriate/foreigner rates.
4. They will have access to private education operated and managed by NGOs and the refugee communities.
5. They can work in the informal sector, i.e., be self-employed for livelihood purposes.

The Hansard also stipulates that "these rights and privileges are not absolute and will be given on a case by case and humanitarian basis. These rights and privileges will be revoked if a refugee or asylum-seeker is involved in criminal activities."

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469 Junaid Ibrahim, 'Undeniable need for caregivers' (The Star, 2 October 2023)

<<https://www.thestar.com.my/news/nation/2023/10/02/undeniable-need-for-caregivers>> accessed 1 March 2024

The same NSC policy goes on to make an unsubstantiated claim that refugees and asylum-seekers have caused a lot of problems in Malaysia (read: *melimpah* in Malay) and hence their presence here is considered a national security concern. The fact that MOHA has been denying the UNCHR access to immigration detention centres (IDCs) since 2019<sup>470</sup> makes it almost impossible for the UN agency to carry out documentation verification. As refugees and asylum-seekers have fled their countries of origin for fear of persecution, they do not have access to embassies and hence are not subjected to the Vienna Convention on Consular Relations 1963, Article 36 of which says:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

According to a report by the International Detention Coalition, “All refugees are at risk of arrest and detention under Malaysian immigration law, which permits arbitrary and indiscriminate arrest and detention. However, Rohingya are at higher risk of arrest and detention than other refugee communities, predominantly due to their visibility as the largest refugee community in Malaysia”<sup>471</sup>.

Malaysia has not made any progress in ratifying the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, despite that a call in this regard has been made for decades by CSOs. However, some small steps are taking place to increase refugee rights<sup>472</sup>.

On 8 May 2023, Deputy Prime Minister Ahmad Zahid Hamidi - after chairing the high-level committee on the management of refugees - issued a statement that the government

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470 A. Ananthalakshmi, ‘Malaysia pressed to probe deaths of 150 foreigners in detention last year’ (Reuters, 23 February 2023)  
<<https://www.reuters.com/world/asia-pacific/malaysia-pressed-probe-deaths-150-foreigners-detention-last-year-2023-02-23/>>  
accessed 1 March 2024

471 Report: <https://idcoalition.org/wp-content/uploads/2023/07/IDC-X-DRC-Research-Report-Impact-of-Detention-Final-English.pdf>

472 ‘Govt mulling agreement with UNHCR over issue of refugees, asylum seekers in M’sia’ (New Straits Times, 8 May 2023)  
<<https://www.nst.com.my/news/nation/2023/05/907193/govt-mulling-agreement-unhcr-over-issue-refugees-asylum-seekers-msia>>  
accessed 1 March 2024

was considering entering an agreement with the UNHCR in line with Resolution 428(V) of the United Nations General Assembly that establishes the roles and responsibilities of the UNHCR as an international body.

A day later, Home Minister Saifuddin Nasution Ismail at another press conference<sup>473</sup> spoke on formulating a clear policy for refugees with regards to access to employment, healthcare and education. According to him, for refugees to be allowed to work, it was of utmost importance that granular data was collected and matched with labour market needs as one effective strategy to fill in job shortages in different sectors.

The statements were received positively and appreciated by civil society and the international community pending the official announcement of transparent SOPs. It is hoped that as a follow-up, the government would implement further programmes that would familiarize the relevant stakeholders, especially enforcement agencies, on the nature and definition of forced labour so as to drastically reduce exploitative labour practices and restore Malaysia's reputation in the global supply chains. It is critically important to ensure that refugees and asylum-seekers, if allowed to work legally, would not be subject to forced labour and exploitative labour practices.

In the previous attempt by the government to collect data on refugees, a third party was contracted to come up with the Refugee Information Tracking System (TRIS). The number of registrants from this system was only 40,000<sup>474</sup>, a much smaller number compared to the 186,490 persons of concern registered by the UNHCR as of January 2024<sup>475</sup>. Civil society groups are concerned about the data security of the information collected by MOHA, fearing that it would be weaponized against migrants, refugees and asylum-seekers as what had happened during the COVID-19 pandemic.

Be that as it may, Malaysia still remains a high-risk country not just for migrant workers but also for investors and businesses as reported in the following two credible global reports. First, the International Trade Union Confederation (ITUC) Global Rights Index 2023 places Malaysia at "Rating 5 - No guarantee of rights", which is the second lowest rating. Second, the Global Slavery Index (GSI) report by Walk Free estimates that there are 202,000 people trapped in modern day slavery conditions in Malaysia<sup>476</sup>. The GSI highlights that electronics from Malaysia "remain the highest value at-risk product imported by G20 countries", and that in Malaysia there are "reported cases of forced labour and debt bondage in the electronics manufacturing industry, which is reliant on migrant labour from Bangladesh, Nepal, Myanmar, and Indonesia".

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473 'M'sia seeking UNHCR help for undocumented migrant data: Saifuddin' (The Vibes, 25 September 2023)

<<https://www.thevibes.com/articles/news/98961/msia-seeking-unhcr-help-for-undocumented-migrant-data-saifuddin>> accessed 1 March 2024

474 Ibid

475 <https://www.unhcr.org/my/what-we-do/figures-glance-malaysia#:~:text=As%20of%20end%20January%202024,registered%20with%20UNHCR%20in%20Malaysia.>

476 Report: <https://cdn.walkfree.org/content/uploads/2023/05/17114737/Global-Slavery-Index-2023.pdf>

## Arrest and Detention of Refugee Minors

Arrest and detention of refugee minors continued in 2023 in Malaysia in a most undignified manner and harmful manner. This was seen in the two arrest and detention cases of refugee minors as observed by SUARAM via Shah Alam High Court cases BA-44-117-09/2023 and BA-44-8-01/2023. This is a result of Malaysian authorities and prosecutors, mainly officers from the Immigration Department and Attorney Generals Chambers, failing to uphold international standards and Malaysia's own laws meant to protect children's rights. The rights which were abused included charging minors as adults and arresting refugees under the article 6(1) (c) of the Immigration Act which says:

*"No person other than a citizen shall enter Malaysia unless- (c) he is in possession of a valid Pass lawfully issued to him to enter Malaysia".*

This act has been abused by the immigration department and attorney general's office as the government has no clear legally binding definition of refugees and classifies them as "undocumented migrants". The reality is refugees may not have the paper documentation needed to cross borders and may even need to use irregular pathways to escape persecution and violence.

The government also ignored the Child Act 2001, which offers protections to children regardless of any circumstances. The preamble of the Child Act 2001 says:

*"Recognizing every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status".*

According to the case involving A 15-year-old Rohingya refugee the Shah Alam High Court ruled to consider safeguards under the law for all children and quashed her immigration offence charge. The High Court judge Hasbullah Adam cited protections under the fourth preamble of the Child Act 2001 and Article 22 of the United Nations Convention of the Rights of the Child (UNCRC) in making the decisions. Article 22 (1) of the UN Convention on the Rights of the Child says:

*" States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties".*

The event as recorded in the court proceedings clearly shows the poor knowledge and disrespect of the law by enforcement bodies and AGCs, thus resulting in the gross violation of refugee children in Malaysia.

## Arrests and Detention of Migrants

Mass arrests and detentions continued in 2023 as enforcement campaigns against undocumented migrants continued unabated in Malaysia. Raids were conducted based on a series of immigration laws: the Immigration Act 1959/63, the Passport Act 1966, the Employment (Restriction) Act 1968 and others. Some raids were conducted in the form of “rescue” under ATIPSOM and the Employment Act. Raids were usually conducted either solely by the Immigration Department or in cooperation with various other enforcement agencies like the police, Labour Department and others. The whole cycle of arrest and detention of migrants only led to more human rights violations throughout 2023.

First, there is a pervasive and yet problematic preconceived notion by the authorities and the Malaysian public that all irregular or undocumented migrants have violated the law. In reality, there are many ways migrants can become undocumented through no fault of their own. According to a report by the IOM, *Assessment of Causes and Contributing Factors to Migrant Workers Becoming Undocumented in Malaysia*<sup>477</sup>, the following are factors that cause migrants to become undocumented as per sample size of 40 migrants in Malaysia:

**TABLE 9: SUMMARY OF REASONS STATED FOR BECOMING UNDOCUMENTED**

Reasons stated for becoming undocumented	Number of migrants reporting reason
Exploitation, unethical recruitment or other labour rights violations	24
Laid off/no longer supported by employer due to COVID-19 pandemic	7
Found other employment	2
Transitioning between visas	1
Employer failed to apply for work permit	1
Undetermined	5
<b>Total</b>	<b>40</b>

The mass arrests and detentions also mean that many migrants who are victims of forced labour and human trafficking may be victimized again through arrest and detention by the authorities, instead of being given a fair and just chance to defend themselves. This also perpetuates a culture of impunity amongst the many agents, employers, human traffickers, smugglers, and corrupt government officials who enable and create conditions that have given rise to mass numbers of undocumented migrants in Malaysia. In a notorious case which was highlighted by Malaysiakini, forged documents were used by bogus employers to traffic migrant workers into the country in a very sophisticated manner

<sup>477</sup> Report: <https://www.iom.int/resources/assessment-causes-and-contributing-factors-migrant-workers-becoming-undocumented-malaysia>

that seemed legitimate on the surface. Till today, the public is yet to see or know if there is any prosecution and conviction of perpetrators who use this highly sophisticated mode of human trafficking to bring migrant workers into the country. As a result, some workers became undocumented and highly susceptible to arrests and detentions<sup>478</sup>.

Second, the Nelson Mandela Rules are seldom applied to detained migrants, resulting in a major violation of the dignity of detainees throughout the whole arrest and detention process and making access to redress and justice almost impossible. This unequal access to justice and remedies is a violation of Article 8 (1) of the Constitution of Malaysia which states **“All persons are equal before the law and entitled to the equal protection of the law.”**

Specifically, the following are the differences of treatment faced by migrants as compared to Malaysians when it comes to arrest and detention:

1. Migrants do not have access to public legal aid assistance. Hence, there is no publicly funded lawyers to assist them at time of remand and other subsequent processes. This causes thousands of migrants to be unrepresented at remand, hearings and sentencing processes in the court.
2. Migrants experience a possible extra 2 weeks of remand as stipulated under the Immigration Act as compared to the Criminal Procedure Code (CPC), under which Malaysian citizens can be detained between 7 to 14 days. This extra 2 week is a very long time which puts migrants in precarious situations, and is equivalent to “double punishment” that is totally unjust.
3. Section 334 of the CPC makes it mandatory for the authorities to hold an inquiry if a death happens in the police lockup, prison or mental (health) hospital, but the fact that IDCs are excluded from this requirement means that many deaths in custody involving migrants could have gone unreported.
4. The Director-General’s Circular 10/2001 of the Ministry of Health requires healthcare practitioners to report to the authorities if undocumented migrants are found to avail themselves of healthcare facilities<sup>479</sup>.

According to the files of lawyers MV Nathan who is also a member of Eliminating Deaths and Abuse in Custody Together (EDICT), as of 2023, the Attorney-General’s Chambers has yet to take the “necessary action” as promised in a letter dated 21 May 2021 with regards to the death of a refugee by the name of Mr Rafi Ullah<sup>480</sup>, who died in the Sungai Buloh prison on 17 February 2021. This indicates that non-citizens in custody face unsafe and undignified circumstances.

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478 S Vinothaa and Ramu Sapkota, ‘Migrant worker import quota won via fake deals, then traded for millions’ (Malaysiakini, 22 November 2023) <<https://www.malaysiakini.com/news/687116>> accessed 1 March 2024

479 [https://www.moh.gov.my/index.php/database\\_stores/attach\\_download/312/127](https://www.moh.gov.my/index.php/database_stores/attach_download/312/127)

480 B Nantha Kumar, ‘Warga Pakistan mati dalam tahanan, keluarga gesa tubuh inkues’ (Malaysiakini, 25 February 2021)

<<https://www.malaysiakini.com/news/564310>> accessed 1 March 2024

## Complexities of Detaining Stateless Persons in Sabah

The Sovereign Migrant Workers Coalition (*Koalisi Buruh Migran Berdaulat - KBMB*), a migrant rights organization, has raised concerns about the abuses and indefinite detention of migrants in Sabah's IDCs. As many who are arrested and detained in Sabah are stateless in nature, the question of which country they should be returned or deported to becomes complicated, as a result of which many are detained indefinitely<sup>481</sup>. This results in higher risks of abuses inside the IDCs and revictimization once they are deported and come back for work, or to be reunited with their families. KBMB has been monitoring arrests, detentions and deportations in Sabah since 2021 and has exposed the abuses in their report *A Report from Hell*<sup>482</sup>.

## Migrant Children in Detention

Malaysia is notorious for arresting and detaining migrant children, especially during raids. According to a report by Human Rights Watch, "as of September 2023, 1,467 children, including 635 girls and 832 boys, were held in 20 immigration detention centres across Malaysia". This is despite Malaysia being a signatory to the UN Convention on the Rights of the Child (CRC). The Office of Children's Commissioner (OCC) of the Malaysian Human Rights Commission (*Suruhanjaya Hak Asasi Manusia, SUHAKAM*) and the End Child Detention Network (ECDN) have urged the Malaysian government<sup>483</sup> to take immediate action towards ending the detention of children in immigration facilities and implementing effective alternatives to Detention (ATD).

As early as 2013, SUHAKAM had facilitated discussions on the forms that ATD could take in Malaysia<sup>484</sup>. Many questions were also raised regarding MOHA's plans to move detained children to Baitul Mahabbah, a so-called "child-friendly" detention centre. The End Detention Network also shared a concern that the Baitul Mahabbah could "continue to deprive children of their liberty, making it a de facto detention centre"<sup>485</sup>.

## Transnational Repression (TNR): Enforced disappearances of Thuzar Maung and her family in Ampang, Selangor (4 July 2023)

On 4 July 2023 at about 4.30 pm, Thuzar Maung (46), a Myanmar refugee and persistent critic of the Myanmar military dictatorship together with her husband, Saw Than Thin Win (43) and her daughter Poeh King Maung (16) and two sons, Aung Myint Maung (21) and Thuka Maung (17) were abducted by a group of men from their home at a gated housing community in Ampang Jaya. According to witnesses and CCTV footage, their

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481 Fathiyah Wardah, 'Koalisi Buruh Kecam Penahanan Buruh Migran Indonesia di Sabah Tanpa Batas Waktu' (VOA Indonesia, 27 June 2023) <<https://www.voaindonesia.com/a/koalisi-buruh-kecam-penahanan-buruh-migran-indonesia-di-sabah-tanpa-batas-waktu-7154383.html>> accessed 1 March 2024

482 <https://solidar.ch/wp-content/uploads/2022/08/Executive-summary-a-report-from-hell.p>

483 <https://idcoalition.org/occ-ecdn-call-on-malaysian-government-to-release-children-from-immigration-detention-implement-atd/>

484 <http://www.suhakam.org.my/wp-content/uploads/2013/12/Report-on-Roundtable-on-ATD-Malaysia.pdf>

485 'Baitul Mahabbah shelter another form of detention, says NGO' (Free Malaysia Today, 4 September 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/09/04/baitul-mahabbah-shelter-another-form-of-detention-says-ngo/>> accessed 1 March 2024

abduction exhibits a high possibility that it was a planned operation. It was also found that the same car which entered the housing area to abduct her and her family had been there less than a month earlier on 19 June 2023.

Thuzar Maung was the leader of two community-based organizations (CBOs), namely the Myanmar Muslim Committee (MMC) and the Myanmar Migrant Workers Committee (MMWC). Both organizations are closely aligned with the exiled National Unity Government (NUG) of Myanmar. At the time of her abduction, she had about 93,000 followers on Facebook alone. This goes to show that her critical views of the military dictatorship did have a significant online resonance and influence with the pro-democracy masses in Myanmar, and one may deduce reasonably that her disappearance could be due to her vigorous activism and advocacy against the brutality and depravity of the military dictatorship back home.

At the time of writing, the Royal Malaysian Police have already launched an investigation into the family's disappearance<sup>486</sup>. What is most unfortunate about her case is that, unlike previous forced disappearances against Malaysian nationals that had taken place, the media coverage or public awareness of the mystery surrounding Thuzar Maung's abduction was extremely and regrettably low, prompting the question as to whether it was because of her and her family being refugees and not citizens of Malaysia.

### **What is Transnational Repression?**

While interventions by governments to silence their citizens living abroad have been happening for many years, it is only until recently that the term Transnational Repression (TNR) has been coined and used. Freedom House defines TNR as "governments reaching across borders to silence dissent among diasporas and exiles, including through assassinations, illegal deportations, abductions, digital threats, Interpol abuse, and family intimidation"<sup>487</sup>. It is clear that political refugees and asylum-seekers in Malaysia have fallen victim to TNR over the past few years.

According to the Committee to Protect Journalists<sup>488</sup>, a Pakistan journalist by the name of Syed Fawad Ali Shah, who was also a refugee in Malaysia, was arrested in August 2022 as a result of the cooperation between Pakistani and Malaysian enforcement agencies. In March 2023, the Home Minister, Saifuddin Nasution Ismail, announced that Syed Fawad had been deported based on a request by the Pakistani government.

### **Forced Labour and Human Trafficking of Migrant Workers**

To date, the United States Office of Customs and Border Protection (CBP) has listed 2 Malaysian companies in the Withhold Release Order list. Besides Brightway Group, FGV Holding Berhad and its subsidiaries and joint ventures are also listed. This means no

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486 Fuad Nizam, 'Police start probe into disappearance of Myanmar activist Thuzar Maung, family' (New Straits Times, 18 July 2023) <<https://www.nst.com.my/news/nation/2023/07/932279/police-start-probe-disappearance-myanmar-activist-thuzar-maung-family>> accessed 1 March 2024

487 <https://freedomhouse.org/report/transnational-repression>

488 <https://cpj.org/2023/03/journalist-syed-fawad-ali-shah-found-jailed-in-pakistan-after-going-missing-in-malaysia>

products made by these companies will be allowed into the US. As FGV is a government-linked company (GLC), it indicates the lack of seriousness on the part of the Malaysian government in resolving forced labour under its own nose.

On 26 September 2023, MOHR launched a book titled *Guidelines on Preventing & Eradicating Forced Labour Practices In The Workplace*<sup>489</sup>. The publication of the 50-page guidelines was a joint collaboration between the Peninsula Malaysia Labour Department and MAPO. While the book that was launched is available to the public, the Enforcement Officers edition is not.

## Recalibration 2.0

In 2023, the government of Malaysia launched the Recalibration 2.0 which aimed to help employers of undocumented migrant workers to register and formalize their workers. It was reported that during the first 5 days of the amnesty programme 472,000 applications were recorded<sup>490</sup>. A total of 1.1 million migrant workers were registered under the programme in 2023, with 518,000 undocumented migrants issued new work permits, as compared to 418,649 undocumented migrants registered involving 30,137 employers<sup>491</sup>. The staggering numbers indicate how much unaccounted surplus value has been leaking from the economy via irregular labour. This unaccounted surplus value would mean that Malaysia's economy has been significantly short-changed by unscrupulous employers who have chosen a business model which exploits migrant workers for profit. This also means losses in tax and unaccounted GDP growth.

While this may be to Malaysia's advantage in the short term, the mismanagement of the migrant labour force in the long run would be a red flag for investors and brands, especially with the upcoming Corporate Sustainability Due Diligence Directive (CSDDD) and the already in force Corporate Sustainability Reporting Directive (CSRD)<sup>492</sup>.

## Recommendations

1. Malaysia urgently needs a Comprehensive National Policy on Migrant Workers. Such a policy has been proposed by the Migrant Workers Right to Redress Coalition, the Car Council, ILO and others. These policies must be evidence/data-driven and transparent in the formulation processes.

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489 Natasha Busst, 'Forced labour victims laud govt announcement on proposed guidelines' (Free Malaysia Today, 29 September 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/09/29/forced-labour-victims-laud-govt-announcement-on-proposed-guidelines/>> accessed 1 March 2024

490 Alyaa Alhadjri, 'Recalibration programme attracts nearly 50k employers in 5 days – DG' (Malaysiakini, 2 February 2023) <<https://www.malaysiakini.com/news/653666>> accessed 1 March 2024

491 Qistina Sallehuddin, 'Malaysian employers given 3-month deadline for foreign workers legalisation' (New Straits Times, 9 January 2024) <<https://www.nst.com.my/news/nation/2024/01/999139/malaysian-employers-given-3-month-deadline-foreign-workers-legalisation>> accessed 1 March 2024

492 [https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en](https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en)

2. For the government to ensure labor rights of all workers are protected within international frameworks including UN Conventions and Free Trade Agreements (FTAs).
3. The government needs to set up a Parliamentary Select Committee on Migrants and Refugees to ensure that issues related to the communities are resolved and their welfare, safeguarded. The PSC on Human Rights and Labor should work with the newly set up PSC to come up with blueprints and comprehensive policies on labor.
4. All immigration detention and deportation centers should be phased out and be replaced with Alternatives to Detention (ATD) programs i.e., community hosting and sponsorship systems that do not criminalize them. Meanwhile, the government should open all detention and deportation centers that take migrants and refugees under custody for checks and inspection by Human Rights agencies and groups.
5. To immediately release all children from detention centers and make immediate efforts ensure they are reunited with families safely.
6. Leaders, politicians and civil servants regardless of rankings need to stop using racially charged language i.e., hate speech, fake news and profiling migrants and refugees in a criminalizing manner.
7. The media, especially government-linked media, should refrain from portraying migrants and refugees in a negative way, which leads to the violation of their rights and dignity, with the possibility of becoming victims of hate crimes. Coverages of enforcement raids should also be comprehensive, fair and objective including exposing employers, agents and human traffickers involved in the abuse of migrant workers.
8. For the government to stop the arbitrary arrest and detention of migrant workers and refugees.
9. To ensure equal access to justice mechanism for all non-citizens, including public funded legal aid services and special visas for non-citizens to stay in Malaysia and pursue cases. This visa should include the right to mobilize, expression and work.
10. With regards to the grossly neglected sector of Domestic Workers, the government must immediately ensure a law and policy to ensure Domestic workers, both foreign and local, enjoy equal protection as compared to all other workers. Ratifying the ILO Convention 189 would be vital to ensure local laws comply with international standards on the protection of Domestic Workers.
11. To amend Section 334 of the Criminal Procedure Code to include immigration detention centres to ensure deaths in immigration detention centres are reported to a Magistrate, who must then order an inquiry into the cause of death.
12. To stop criminalizing migrants from practicing their fundamental liberties like the right to assembly and freedom of expression by ensuring no laws criminalize them for practicing these rights.
13. To enforce laws to curb job scam cum human trafficking of migrants by holding directors of the companies accountable and ensuring asset recovery from them via the relevant laws.
14. To ensure the automatic compliance of the Collective Agreements for migrant workers working in Unionized work environments which have a ready collective agreement.

15. To come up with legal frameworks to ensure refugees and asylum seekers' rights are protected in Malaysia, including non-criminalizing and non-refoulement. This is especially to stop criminalizing them under the immigration laws and ensuring the right to work, education and health while in Malaysia.
16. To ensure the govt does all it can to prevent transnational repression (TNR) towards refugees by foreign governments who seek to silent dissidents. And to investigate and ensure justice for victims of TNR.
17. As per global standards and upcoming international laws on supply chains, it is vital Malaysia take all steps and actions to eliminate forced labor from our supply chains, at all tiers including GLCs, TNCs, SMEs and GLIC supported companies. This is especially with regards to due diligence laws and ESG standards which will result in higher degree of liability to protect workers and the environment.
18. To stop high and exorbitant compounds, fines and fees for amnesty and rehiring programs for migrant workers to go home safely or to rejoin the workforce formally.
19. To ensure migrant workers and refugees have access to public health care at the same rate as citizens based on principles of non-discrimination.
20. To eliminate corruption, collusion, and cronyism from all systems related to the government of migrant workers. This could be done by ensuring only one lead agency oversees the recruitment of migrant workers into Malaysia.



HUMAN RIGHTS  
VIOLATIONS AGAINST  
LGBTQ+ PERSONS

# HUMAN RIGHTS VIOLATIONS AGAINST LGBTQ+ PERSONS

*Author: thilaga sulathireh*

LGBTQ and gender-diverse people have faced increasing restrictions and deterioration of rights over the last decade. This includes through criminalisation under various laws, state sponsored conversion practices, and censorship, among other forms of state-sanctioned regulations on the basis of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC).

In 2023, LGBTQ and gender-diverse people continued to face a series of state-sponsored human rights violations. Some key trends include the increased:

- Regulations of LGBT expression through introduction of new guidelines;
- Hate and discriminatory speech against these communities;
- Restrictions of freedom of assembly and expression, including disruption and investigation of LGBT-related public assemblies and organisers as well as participants of the assemblies, surveillance of LGBT events, among others; and
- LGBT rehabilitation efforts.

The Malaysian government, regardless of administration, has adopted varying exclusionary and discriminatory positions and actions in relation to LGBTQ-related issues and human rights. The government's position is often expressed and reiterated both domestically through Parliament or media agencies, and internationally.

For example, in a written reply to a parliamentary question in May 2023, the current Minister in the Prime Minister's Department (Religious Affairs) reiterated the general stance by the Malaysian government on LGBTQ-related issues. This position can be summarised as follows:

*As a country that upholds Islam as the religion of the Federation and that instils moral values based on traditions, culture and religion, the government is firm in not recognizing the lesbian, gay, bisexual and transgender people. 'LGBT behaviour' (added by writer) is against religion, morals, Malaysia's culture and laws, both civil and Syariah laws. ... LGBT communities' rights to 'practise their lifestyle' are subject to the laws that prohibit such acts. Nonetheless, the government does discriminate against any groups, including LGBT people, in enjoying their human rights as enshrined in the Federal Constitution, including right to education, right to practise their religion, and right to employment consistent with Article 8(2) of the Federal Constitution<sup>493</sup>.*

Contrary to the statement by the Minister and the state's position, LGBT people's rights to education, freedom of religion and employment, among others continue to decline, largely due to the state's non-evidence and rights-based approach to LGBT-related issues and

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493 Written reply to parliamentary question JDR22052023, 22 May 2023

rights. The government also does not understand that it is challenging for LGBT people to access, let alone enjoy, rights as a result of criminalization and regulation by the state.

### **Criminalisation & Regulation of LGBT Identities, Expression and Other Aspects of Life**

LGBTQ and gender-diverse people are criminalised on the basis of sexual orientation, gender identity, gender expression and consensual sexual acts between adults under various Federal and state levels. The overall context of criminalisation of LGBTQ and gender-diverse people has a systemic impact on all areas of their lives, including among others, being free from violence and unnecessary state intervention in their private and personal lives, and the ability to seek redress, opportunities, and information.

LGBTQ and gender-diverse people have reported extortion, invasion of privacy, harassment and intimidation owing to the criminalisation and regulation of LGBTQ and gender-diverse people in Malaysia. Queer men and gender-diverse people, among others, have reported harassment and intimidation by the police at roadblocks and in public places, where the police checked their phones for LGBT-related apps and content<sup>494</sup>. A survey respondent who identified as a gay cisgender man reported harassment by police officers, where he was arbitrarily stopped for a random check and, during which he was told that, “do you know that gay people are not allowed in this country?”<sup>495</sup>

### **Sections 377A & B of the Penal Code**

At the Federal level, Sections 377A and B of the Penal Code penalise carnal intercourse between adults. While the said Sections are gender-neutral, they are often perceived as laws criminalising LGBT people, resulting in increased vulnerability to discrimination, violence and exclusion by state and non-state actors.

Justice for Sisters’ (JFS) media monitoring on the use of Sections 377A and B as well as 377C, which criminalise non-consensual carnal intercourse, found that the laws are used interchangeably in cases of non-consensual sex. In the monitored cases, JFS found that Sections 377A and B are used in cases of prosecution, where the perpetrators are charged for violent and non-consensual acts against the victims<sup>496</sup>.

The monitoring suggests that Section 377A is interpreted as being silent on consent, as such they are used in the context of both consensual and non-consensual sexual

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494 Queer Lapis, ‘Can the police check your Grindr at a roadblock?’ <<https://www.queerlapis.com/can-police-check-your-grindr/>> accessed 16 February 2024

495 Justice for Sisters, Diversity Malaysia, PLUHO and Queer Lapis, ‘Survey findings: Impact of Covid-19 & anti-LGBT narratives on LGBTQ+ persons in Malaysia’ <[https://www.queerlapis.com/wp-content/uploads/2021/12/311221-Survey-findings\\_Impact-of-Covid-19-and-anti-LGBT-narratives-on-LGBT-persons-in-Malaysia.pdf](https://www.queerlapis.com/wp-content/uploads/2021/12/311221-Survey-findings_Impact-of-Covid-19-and-anti-LGBT-narratives-on-LGBT-persons-in-Malaysia.pdf)> accessed 16 February 2024

496 1) Johor (2021) sexual violence by a father against his daughter, 2) Selangor (2020) sexual violence by three men, including ex-boyfriend 3) Melaka (2020) sexual violence by a man against his relative (a child) 4) Melaka (2017) two men charged with sexual assault against a teenage girl. One of them charged under 377A&B 5) Terengganu (2019) sexual violence by father against his child with disabilities 6) Terengganu (2019) sexual violence by a father against his 12 year old child 7) Selangor (2021) a man charged for sexually assaulting a woman 8) Selangor (2020) a woman reported that she was sexually assaulted and robbed

intercourse. This raises concerns over the use of two laws for the same crime of non-consensual sex against adults and children.

#### **Sections 377A, B and C of the Penal Code (Act 574)**

##### **377A. Carnal intercourse against the order of nature**

Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

*Explanation—Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section*

##### **377B. Punishment for committing carnal intercourse against the order of nature**

Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and whipping.

##### **377C. Committing carnal intercourse against the order of nature without consent, etc.**

Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and to whipping.

#### **State Syariah Laws**

As of 2023, there are at least 52 state Syariah laws (*please see table 1 at the end of the chapter*) that criminalise LGBT people on the basis of their SOGIE and consensual sexual acts between adults, eight of which were introduced between 2019 and 2022 in Negeri Sembilan, Kelantan and Terengganu.

The new laws in Kelantan and Terengganu came into force and were introduced following the Iki Putra decision by the Federal Court. The Court, in accordance with Article 74, Federal and state lists of the Federal Constitution, affirmed that state governments do not have the legislative jurisdiction to enact criminal laws, including laws prohibiting consensual sex between adults<sup>497</sup>.

Additionally, *fatwa*, guidelines and other measures also regulate and prohibit LGBT expressions, right to self-determination, access to health and religious spaces, and public life, among others.

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497 Ida Lim, 'Federal Court unanimously declares Selangor Syariah law criminalising 'unnatural sex' void, unconstitutional' (Malay Mail, 25 February 2021) <<https://www.malaymail.com/news/malaysia/2021/02/25/federal-court-unanimously-declares-selangor-shariah-law-criminalising-unnat/1952701>> accessed 30 October 2023

It is also important to note that the criminalisation and regulation of actual or perceived LGBTQ people by the Malaysian government is not limited to citizens, but also includes foreigners and non-citizen as evidenced by the introduction of the recent guidelines for foreign performers and the trend of censorship.

### Trend of Criminalisation and Regulations

The trend of criminalisation and regulations against LGBTQ and gender-diverse people by the Malaysian government can be observed through the:

- Introduction of anti-LGBT state Syariah laws. There are three key elements that can be observed at the state level:
  - Increased punishment to existing anti-LGBT laws, where possible. Many of the *liwat* (sexual relations between men or anal sex) and *musahaqah* (sexual relations between women) laws already carry maximum punishments. The increase of punishment is seen mainly in laws targeting trans people through the ‘male or female persons posing as a woman or man’ provisions.
  - Re-defining scope of criminalisation. For example, in the new Kelantan Syariah Criminal Offences Enactment, the scope of criminalisation of trans people has been expanded from prohibition of trans and gender-diverse people’s gender expression in public places to ‘*any public place or in any private place publicly visible or accessible*’.
  - Introduction of new laws, including the attempt of *musahaqah* and *liwat*, female person posing as a man in Kelantan and Terengganu, as well as changing gender in Kelantan.
- Introduction and amendments to guidelines, reinforcing harmful gender norms. This includes:
  - New prohibition of male foreign artistes from “dressing up and wearing clothes that cause them to resemble women” by the Central Agency for Application for Filming and Performance by Foreign Artistes (PUSPAL) in March 2023<sup>498</sup>. PUSPAL is an agency under the purview of the Ministry of Communications and Digital<sup>499</sup>.
  - Introduction of guidelines on entertainment activities (concerts) in higher learning institutions by the Department of Higher Education (JPT) under the Ministry of Higher Education. The guidelines, among others, introduced:
    - Prohibition of performers-based association with LGBT people or actual or perceived sexual orientation, gender identity and gender expression
    - Regulation of attire, hairstyles, accessories, physical interaction, movement of performers

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498 ‘MOHE leaves it up to colleges to set guidelines on organisation of entertainment activities’ (The Edge, 1 September 2023)

<<https://theedgemaalaysia.com/node/681032>> accessed 30 October 2023> accessed 30 October 2023

499 Amir Yusof, ‘No cross-dressing for male artistes, blackout dates on Islamic holidays among updated rules for Malaysia concerts’

(Channel News Asia, 15 March 2023) <[https://www.channelnewsasia.com/asia/malaysia-concert-rules-no-cross-dressing-male-performers-blackout-dates-islamic-holidays-](https://www.channelnewsasia.com/asia/malaysia-concert-rules-no-cross-dressing-male-performers-blackout-dates-islamic-holidays-3348541#:~:text=For%20instance%2C%20the%20dress%20code,%E2%80%9COnly%20underwear%E2%80%9D%20when%20performin)

[3348541#:~:text=For%20instance%2C%20the%20dress%20code,%E2%80%9COnly%20underwear%E2%80%9D%20when%20performin](https://www.channelnewsasia.com/asia/malaysia-concert-rules-no-cross-dressing-male-performers-blackout-dates-islamic-holidays-3348541#:~:text=For%20instance%2C%20the%20dress%20code,%E2%80%9COnly%20underwear%E2%80%9D%20when%20performin)

[g> accessed 30 October 2023](https://www.channelnewsasia.com/asia/malaysia-concert-rules-no-cross-dressing-male-performers-blackout-dates-islamic-holidays-3348541#:~:text=For%20instance%2C%20the%20dress%20code,%E2%80%9COnly%20underwear%E2%80%9D%20when%20performin)

- Prohibition of symbols and display of support in solidarity with LGBT people/issues
- Regulations on interactions, including gender segregated seating arrangements, and removal of standing area for attendees<sup>500</sup>
- Use of broad and vague existing laws and misuse of public morality, such as Section 7 of the Printing Presses and Publication Act and Section 233 of the Communications and Multimedia Act. Between 2020 and 2023, the Printing, Publication and Presses Act has been used at least 7 times against LGBT expressions through censorship of publications, and the removal of watches with LGBT-related imprints.

### State-Funded LGBT Rehabilitation Programmes

LGBT rehabilitation programmes have intensified and expanded under the Prime Minister's Department (Religious Affairs), the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia*, JAKIM) and state Islamic departments since 2010. LGBT rehabilitation or any form of SOGIE change efforts or conversion practices are harmful and have been widely discredited. Given the long-term psychological harm, increasingly, more countries have introduced policies to protect the health and well-being and prohibit or regulate conversion practices<sup>501</sup>.

JFS' survey found at least 66% of 156 LGBTIQ and gender-diverse respondents had experienced pressure to change their SOGIE by various actors. The study also extrapolated that 1 out of 10 respondents had been forcibly sent to an external party to be 'corrected'. This is consistent with SUHAKAM's study, which found 15% of 100 trans and intersex respondents who had forcibly been sent to an external party to be corrected. The survey found the pressure to change the respondents SOGIE, resulted in:

- 45.5% of them facing increased stress, anxiety, isolation, and other forms of burden on mental health;
- 36.6% of them feeling unmotivated, and loss of interest in school, work, family activities, social activities and others;
- 32.5% of them experiencing suicidal thoughts and attempts; and
- 4.9% of them dropping out of school<sup>502</sup>.

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500 'Media statement: Recall Ministry of Higher Education's entertainment guideline' (Justice for Sisters, 11 September 2023) <<https://justiceforsisters.wordpress.com/2023/09/11/media-statement-recall-ministry-of-higher-educations-entertainment-guideline/>> accessed 30 October 2023

501 'Appendix 3: Measures taken by country' (Government Equalities Office, 25 October 2022) <<https://www.gov.uk/government/publications/conversion-therapy-an-evidence-assessment-and-qualitative-study/appendix-3-measures-taken-by-country>> accessed 30 October 2023

502 'Situation in Malaysia - Justice for sisters' (Justice for Sisters, 6 June 2023) <<https://justiceforsisters.org/en/balik-pangkal-jalan/situation-in-malaysia/>> accessed 30 October 2023

The government in many instances have relied on discredited and harmful sources of information and so-called experts<sup>503,504</sup> in implementing its activities, and in supporting its position and efficacy of LGBT rehabilitation<sup>505</sup>, while creating distinction between the ‘western conversion practices’ and the efforts undertaken by the government<sup>506,507</sup>.

The LGBT rehabilitation programmes and advocacy may appear as a ‘softer’ approach and even alternative to criminal punishment, it still reinforces cis and heteronormative constructs, where only the combination of cisgender heterosexual identities can exist. Identities that exist outside of the construct are either punished, censored or ‘rehabilitated’.

The Minister in the Prime Minister’s Department (Religious Affairs) periodically provides updates of the government’s ‘progress’ in addressing what it views as the LGBT problem<sup>508</sup>. According to the Minister, between January 2021 and April 2023, the Prime Minister’s Department with other agencies have undertaken a range of activities categorised under four aspects.

- a) **Education, prevention and advocacy.** 18 collaborative media, online and offline programmes have been undertaken in collaboration with various government agencies and non-governmental organisations<sup>509</sup> targeting young people<sup>510</sup> and Muslim outreach groups (*komuniti dakwah* dan *tarbiah*).
- b) **Research.** Two transgender related studies both focusing on rehabilitation of transgender people were reportedly undertaken within the reported period<sup>511</sup>.
- c) **Dakwah and guidance.** Six activities were undertaken by state Islamic councils, Yayasan Ihtimam Malaysia (YIM), and the *hijrah* community. The *hijrah* community refers to ex-LGBT people or LGBT people who may have ‘changed’ or suppressed

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503 ‘Pengamal kesihatan bimbang ubat PrEP kepada pasangan gay diperluaskan KKM’ (Agenda Daily, 8 December 2022)

<<https://www.agendadaily.com/isu-semasa/pengamal-kesihatan-bimbang-ubat-prep-kepada-pasangan-gay-diperluaskan-kkm/>>  
accessed 30 October 2023

504 See LGBT and Spirituality: A Holistic Approach to Care (page 34)

[https://www.medicineandhealthukm.com/sites/medicineandhealthukm.com/files/article/2022/16th\\_congress\\_of\\_asia\\_oceania\\_federation\\_for\\_sexol\\_18878.pdf](https://www.medicineandhealthukm.com/sites/medicineandhealthukm.com/files/article/2022/16th_congress_of_asia_oceania_federation_for_sexol_18878.pdf)

505 ‘Majlis Perasmian Kem Ibadah Nusantara Kali Ke-3’ (JAKIM, 5 October 2023) <<https://www.islam.gov.my/en/berita/3902-majlis-perasmian-kem-ibadah-nusantara-kali-ke-3>> accessed 30 October 2023

506 Honouring the religious rights of the LGBTQ persons: an Islamic perspective. (2023). TAFHIM IKIM Journal of Islam and the Contemporary World, 16(1), 1–33. <https://doi.org/10.56389/tafhim.vol16no1.4>

507 Mohd Haridi, N. H., Ismail, A. M., Subhi, N., & Hussin, H. (n.d.). Komponen dalam model pemulihan holistic terhadap Lesbian, Gay, Biseksual dan Transgender (LGBT di Malaysia). Jurnal Al-Ummah 3 (2021M/1443H): 165-188.

508 Luqman Hakim and Nor Ain Mohamed Radhi, ‘Jakim to work with Health Ministry to address LGBT issues’ (New Straits Times, 18 October 2023) <<https://www.nst.com.my/news/nation/2023/10/968489/jakim-work-health-ministry-address-lgbt-issues>> accessed 30 October 2023

509 JAKIM, Ministry of Youth and Sports, Ministry of Health, IKIM, Al-Hijrah TV, Selangor Mufti Office and YADIM

510 Ministry of Health through youth-based PROSTAR (Program Sihat Tanpa AIDS Remaja) 2.0 programme

511 1) collaborative research between the University of Islamic Science Malaysia (USIM) and JAKIM funded by a JAKIM research grant.  
2) Master’s Dissertation on A Rehabilitation Approach to Transgender People According to Fiqh Al-Hadith: A Study of Rehabilitation Programs by the Islamic Development Department of Malaysia (Pendekatan Pemulihan Terhadap Golongan Transgender Menurut Fiqh Al-Hadith : Kajian Terhadap Program Pemulihan Oleh Jabatan Kemajuan Islam Malaysia)

their sexual orientation, gender identity and gender expression. They may no longer fully identify with their ‘former’ identities. Some may still do, but only in the safest environments. On 18 October 2023, the Minister reported that the government had held 4 *Mukhayyam* camps attended by 220 people<sup>512</sup>.

- d) **Action and enforcement.** This includes censorship of the Lightyear animation, investigation of the Women’s March organisers, and others.

Aside from the four aspects, a special committee on Muslim LGBT issues composed of state agencies and non-governmental organisations, which meets annually or based on needs, has been established according to the Minister.

None of these programmes fundamentally address the marginalisation of LGBT people due to the discrimination by the state and society through a rights and evidence-based approach. Instead, LGBT people’s SOGIESC are moralised and demonised as a sin, and wrongly medicalised and pathologized. Relatedly, HIV is moralised and weaponised as being a consequence for “being LGBT”. Pseudo-scientific and harmful religious methods are then adopted to ‘cure’, ‘treat’ and ‘rehabilitate’ LGBT people to the right path, resulting in further harm to LGBT people and gendered mis/disinformation.

In November 2023, the Johor State Islamic Religious Affairs Committee chairman Mohd Fared Mohd Khalid, announced that it will be establishing a rehabilitation centre for Muslim persons deemed as having deviated from Islamic teaching and LGBT people. He added that the centre aim to “guide these groups but also to steer them back into the right path”. The centre, which is expected to begin its operations in July 2024, has received an allocation of RM 400,000<sup>513</sup>. While the idea of rehabilitation centre for LGBT people has been floated before by Senators and politicians alike in the past<sup>514</sup>, the Johor centre is the first of its kind in Malaysia. That said, LGBT people have been subjected to court mandated rehabilitation in the past, although their number is under-documented.

It is important to reiterate that LGBT rehabilitation, conversion practices or SOGIE change efforts are not only evidence and rights-based, but also harmful. These practices, which are built on misinformation, have been widely discredited due to its long-term harmful impact on LGBTQ people. In 2020, the Independent Expert on SOGI called for a global ban on so-called conversion therapy or conversion practices<sup>515</sup>.

### **Increasing Censorship against LGBT Expressions**

In response to a question in Parliament about the introduction of laws to prohibit LGBT open or closed events, and regulation of non-governmental organisations that promote

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512 Parliament Hansard, 18 October 2023

513 Mohamed Farid Noh, ‘Johor to set up first Islamic rehab centre for ‘deviants’, LGBT community’ (New Straits Times, 29 November 2023)<<https://www.nst.com.my/news/nation/2023/11/984546/johor-set-first-islamic-rehab-centre-deviants-lgbt-community>> accessed 16 February 2024

514 Tuty Haryanti Ahmad Rodzi, ‘Syor wujud pusat tahanan, pemulihan LGBT’ (Berita Harian, 12 June 2021) <<https://www.bharian.com.my/berita/nasional/2021/06/827003/syor-wujud-pusat-tahanan-pemulihan-lgbt/>> accessed 16 February 2024

515 UN expert calls for global ban on practices of so-called “conversion therapy”

LGBT people, the Minister noted that the Peaceful Assembly Act (PAA) can be applied in such situations. He added that promotion of LGBT issues can be restricted on the grounds of 'public order'. Misguidedly, he noted that Section 15 of the PAA can be invoked to safeguard the 'safety or public order, including protection of others' rights and freedom'.

Under international human rights law, restrictions of rights must be justified and satisfy the test of legality, necessity and proportionality. Article 29 of the Universal Declaration of Human Rights (UDHR) allows limitations of rights solely to secure due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in a democratic society. In this case, the restriction of human rights of LGBTIQ and gender-diverse people in the interest of the majority, results in tyranny of the majority and decline of rights of minorities.

JFS' documentation and research has found that the overall restrictive environment has a profound impact on LGBT people's ability to express themselves and engage in public life, report cases of violence and discrimination, among others. The restrictive environment has also increased trust deficit in public institutions, and the desire to seek asylum and migration among LGBTIQ and gender-diverse people<sup>516</sup>.

There were five key events:

- **Introduction of guidelines for foreign performers by PUSPAL (March 2023) and concerts in universities by the Ministry of Higher Education (September 2023).**
- **Cancellation of the Good Vibes festival and the subsequent self-censorship by foreign artists.**

In July 2023, the Ministry of Communication and Digital cancelled the Good Vibes Festival following a protest against the discrimination of LGBTQ people in Malaysia by a foreign band. The protest involved two of the band members kissing on stage. Following the incident, Muse removed a song from the setlist of at least two foreign artists in order to comply with the government's guidelines<sup>517,518</sup>. Similarly, A-Mei, a Taiwanese singer also changed her setlist and released an advisory to fans and concert attendees, which among others prohibited any kind of flags with the image of the rainbow<sup>519</sup>.

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516 'Survey findings: Impact of Covid-19 & anti-LGBT narratives on LGBTQ+ persons in Malaysia out now - Queer Lapis.' (Queer Lapis, 23 March 2023) <<https://www.queerlapis.com/survey-findings-impact-of-covid-19-anti-lgbt-narratives-on-lgbtq-persons-in-malaysia-out-now/>> accessed 30 October 2023

517 Isobel Lewis, 'Muse explain decision to change setlist for Malaysia show following Matty Healy controversy' (The Independent, 1 August 2023) <<https://www.independent.co.uk/arts-entertainment/music/news/muse-matty-healy-malaysia-resistance-ban-b2385551.html>> accessed 30 October 2023

518 Damian Jones, 'Muse reveal song swapped and reason for Malaysia setlist change amidst 1975 controversy' (NME, 3 August 2023) <<https://www.nme.com/news/music/muse-reveal-song-swapped-and-reason-for-malaysia-setlist-change-amidst-1975-controversy-3476249#>> accessed 30 October 2023

519 Azri Azizan, 'Taiwanese Singer, A-Mei Not Allowed to Sing "Rainbow" in M'sia Due to its LGBTQ Elements, Flags are Banned Too' (World of Buzz, 26 August 2023) <<https://worldofbuzz.com/taiwanese-singer-a-mei-not-allowed-to-sing-rainbow-in-msia-due-to-its-lgbtq-elements-flags-are-banned-too/>> accessed 30 October 2023

- **Banning of pride-themed Swatch watches.**

On 22 May 2023, Swatch reported raids on 11 Swatch outlets by the Ministry of Home Affairs (MOHA) resulting in confiscation of their limited-edition Pride collection watches. A total of 172 watches, worth over US\$14,000 or RM64,255 were confiscated for violating Section 7 of the Printing Presses and Publication Act (PPPA)<sup>520</sup>. The raids were triggered by social media posts by online users linking the watches with Coldplay, who are slated to be performing in Malaysia in November 2023. Swatch filed a judicial review to challenge the grounds of the raid, and the confiscation of the watches in June<sup>521</sup>. In August 2023, the Kuala Lumpur High Court granted Swatch leave to pursue its judicial review<sup>522</sup>. Under Section 7(1), the Minister is expected to make an order regarding the prohibition of the watches. The orders are typically published as a Gazette on the Attorney General Chambers' (AGC) website. However, the gazette was only published in August 2023, months following the raid and filing the judicial review<sup>523</sup>.

- **Overturing of the High Court's decision, which lifted the ban on Gay is OK! A Christian Perspective, by the Court of Appeal.**

In a split 2-1 decision, the Court of Appeal overturned the High Court decision and reinstated the ban on the book. The book was banned in 2020, seven years after it was published in 2013, by the then Minister of Home Affairs on the grounds that it is likely to be prejudicial to public order, morality and public interest. Two of the Court of Appeal judges sided with the then Minister's decision and further added that the content and the title of the book are likely being prejudicial to public order, morality and public interest, in spite of the lack of evidence by the Minister to support his claims, and the book being in circulation for seven years with no issues. Meanwhile, the dissenting judge agreed with the High Court judge's decision to quash the ban<sup>524</sup>. The Court ordered a cost of RM 15,000 to be paid to the respondents - the Ministry of Home Affairs and the government.

- **Banning of LGBT websites**

In October 2023, in response to a PAS member of parliamentary question regarding actions by the Ministry of Communication and Digital to 11 applications that facilitate

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520 'Swatch raid over Pride-themed watches calls for a review of the Printing, Presses and Publication Act (PPPA)' (Justice for Sisters, 26 May 2023) <<https://justiceforsisters.wordpress.com/2023/05/26/swatch-raid-over-pride-themed-watches-calls-for-a-review-of-the-printing-presses-and-publication-act-pppa/>> accessed 30 October 2023

521 'Swatch sues Malaysia over seizure of LGBTQ pride watches' (Al Jazeera, 17 July 2023) <<https://www.aljazeera.com/economy/2023/7/17/swatch-sues-malaysia-over-seizure-of-lgbtq-pride-watches>> accessed 30 October 2023

522 Rahmat Khairulrijal, 'Swatch Malaysia granted permission to challenge Home Ministry's confiscation of 172 watches from Pride Collection' (New Straits Times, 23 August 2023) <<https://www.nst.com.my/news/crime-courts/2023/08/946289/swatch-malaysia-granted-permission-challenge-home-ministrys>> accessed 30 October 2023

523 Ida Lim, 'Three months after raids, Home Ministry bans 'LGBTQ+' on Swatch watches' (Malay Mail, 10 August 2023) <<https://www.malaymail.com/news/malaysia/2023/08/10/three-months-after-raids-home-ministry-bans-lgbtq-on-swatch-watches/84574>> accessed 30 October 2023

524 Ida Lim, 'In 2-1 decision, Court of Appeal restores Home Ministry's ban on 'Gay is OK!' book' (Malay Mail, 25 September 2023) <<https://www.malaymail.com/news/malaysia/2023/09/25/in-2-1-decision-court-of-appeal-restores-home-ministrys-ban-on-gay-is-ok-book/92737>> accessed 30 October 2023

'LGBT activities', the Minister shared that the Ministry has reportedly received 35 public 'complaints' in relation to 'deviant' activities via websites and applications between 2021 and September 2023. Meanwhile, 85 websites and applications with related domain names have been blocked. It is, however, unclear as to the types of LGBT-related websites and applications that have been blocked<sup>525</sup>.

### **Investigation into Organisers of Peaceful Assemblies**

In 2023, at least two LGBT-inclusive and related rallies or protests were investigated by the police. In both cases, the police investigated the organisers and participants of the rally or protest under Section 9(5) of the PAA, for failure to provide prior notification at least five days before the assembly; and Section 14 of the Minor Offences Act 1955 on insulting behaviour.

It is important to note that the PAA does not require approval or a permit for an assembly. However, the PAA requires the organisers to provide a notification to the police *five days prior to the assembly*. Under international human rights law notification prior to assembly is not mandatory. Moreover, *non-compliance should not result in criminal or administrative sanctions*. It is also important to understand the difference between notification procedure and the permission requirement. The purpose of a notification procedure is to "*trigger the positive obligations of the state to facilitate the exercise of freedom of peaceful assembly, consistent with the "principle of presumption" in favour of holding assemblies outlined in the OSCE/ODIHR Guidelines on Assembly*".

Section 14 of the Minor Offences Act is increasingly used as grounds for investigation of the organisers, participants, and monitors of the rallies due to alleged insulting placards, even if they are calling for gender equality, bodily autonomy and rights, protection of LGBT people, among others.

These cases include:

- **The Women's March in March 2023.**

The Women's March's organisers have been consistently called in for investigation. In 2023, they were investigated under Section 9(5) of the PAA, for alleged failure to provide prior notification at least five days before the assembly; and Section 14 of the Minor Offences Act 1955 on insulting behaviour. The organisers of the Women's March had notified the police six days prior to the march. The investigation was later dropped.

- **A protest in solidarity with LGBT people by followers of the Ahmadi Religion of Peace and Light in July 2023.**

Unlike other protests, the protest by the eight members of the Ahmadi Religion of Peace and Light was disrupted by the police. They were subsequently arrested and detained at the Dang Wangi police station, where their statements were taken. The

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<sup>525</sup> Mohammad Khairil Ashraf Mohd Khalid, '85 aplikasi, laman sesawang aktiviti songsang disekat' (Harian Metro, 13 October 2023)

<<https://www.hmetro.com.my/mutakhir/2023/10/1019493/85-aplikasi-laman-sesawang-aktiviti-songsang-disekat>> accessed 30

October 2023

eight were investigated under Section 186 of the Penal Code, Section 14 of the Minor Offences Act 1955, and Section 9(5) of the PAA. Section 186 penalises obstruction of any public servant in the discharge of his public functions. Given the fact that they are a minority religious sect, the Federal Territories Islamic Religious Department (*Jabatan Agama Islam Wilayah Persekutuan*, JAWI) also opened an investigation paper on the protestors<sup>526</sup>. The outcomes of the investigations are unknown.

Both events received high levels of violent comments. JFS has documented extreme, violent and degrading speech against protestors, and LGBTQ and gender-diverse people in various spaces, including social media and in Parliament. These include:

- Calls to kill themselves, or be killed, and the ‘extinction’ of LGBT people;
- Calls for physical and sexual violence against protestors and LGBT people;
- Calls for war or jihad against LGBT people and lust. e.g., An article published in *Harakah Daily*, ‘*Perang, adakah hanya sekadar angkat senjata?*’ (War, is it just a matter of taking up arms?);
- Comparison of LGBT people to animals by Members of Parliament<sup>527</sup>.

Under international human rights law, restrictions on the right to freedom of expression are permitted only if they are: (a) provided by law, (b) in pursuit of a legitimate aim, including protecting the rights of others, and (c) necessary and proportionate to that aim. Additionally, IHRL requires that governments restrict speech that constitutes incitement to discrimination, hostility, violence or international crimes<sup>528</sup>.

### **Increasing Violence Against LGBT People, Including Hate Speech**

Discriminatory and hate speech against LGBT people is high, however unaddressed. JFS’ documentation shows that a significant amount of anti-LGBT comments blatantly advocates for discrimination and hatred constituting incitement of hostility, discrimination and violence.

An election monitoring report found that gender and LGBTIQ-related ‘offensive speech’ made up 47% of the overall social media posts monitored. Further, they were at least 2 times higher than ‘offensive speech’ related to religion and race<sup>529</sup>.

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526 ‘Eight men from “Ahmadi Religion of Peace and Light” group detained for LGBT gathering’ (New Straits Times, 31 July 2023) <<https://www.nst.com.my/news/crime-courts/2023/07/937143/eight-men-ahmadi-religion-peace-and-light-group-detained-lgbt>> accessed 30 October 2023

527 ‘Media statement: End all forms of harassment against the Women’s March Malaysia 2023’ (Justice for Sisters, 17 March 2023) <<https://justiceforsisters.wordpress.com/2023/03/17/media-statement-end-all-forms-harassment-against-organisers-and-participants-of-the-womens-march-malaysia-2023/>> accessed 30 October 2023

528 Ibid

529 Centre for Independent Journalism, ‘15th General Elections Social Media Monitoring’ <<https://cijmalaysia.net/election-monitoring/>> accessed 30 October 2023

A survey with 220 LGBT people found 55% and 53% faced increased stress due to media sensationalism and online hate speech respectively. Meanwhile, about 33% - 39% experienced discrimination<sup>530</sup>.

### **Hate Crime and Murder of Trans and Gender-Diverse People**

At least two murders of trans women were reported in June and October 2023. Justice for Sisters monitoring shows that the police and media are ill-equipped to address and report cases of violence and hate crimes against LGBTQ persons, particularly trans and gender-diverse persons. In the case reported in October 2023, the trans woman was not only misgendered, but the police were also quick to rule out hate crime elements despite the brutal violence and pending lab reports<sup>531</sup>.

JFS does not intend to assume or assign Nhaveen an identity. However, it is important to note that Nhaveen was a victim of gender-based violence, as he was bullied based on his gender expression and perceived sexual orientation. In 2017, Nhaveen died following brutal attacks by his assailants.

On 3 October, the five men accused of Nhaveen's murder were acquitted<sup>532</sup>. Later in the same month, the AGC reported that it will appeal the acquittal<sup>533</sup>. The media has widely reported delays and shortcomings in the trial. Based on media monitoring, Justice for Sisters found shortcomings in the evidence gathering processes by the police. Nhaveen's family were also reportedly planning to initiate a legal suit against the hospital and police<sup>534</sup>.

### **Conclusion**

The human rights of LGBTIQ and gender-diverse people in Malaysia continue to deteriorate at an alarming rate. The lack of protection and increasing discrimination and violence with impunity leave LGBTIQ and gender-diverse people with extremely limited

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530 Justice for Sisters, PLUHO, Queer Lapis, & Diversity. (2021). Survey findings: Impact of Covid-19 & anti-LGBT narratives on LGBTQ+ persons in Malaysia. [https://www.queerlapis.com/wp-content/uploads/2021/12/311221-Survey-findings\\_Impact-of-Covid-19-and-anti-LGBT-narratives-on-LGBT-persons-in-Malaysia.pdf](https://www.queerlapis.com/wp-content/uploads/2021/12/311221-Survey-findings_Impact-of-Covid-19-and-anti-LGBT-narratives-on-LGBT-persons-in-Malaysia.pdf), pages 23 – 25

531 'Media statement: End all forms of harassment against the Women's March Malaysia 2023' (Justice for Sisters, 17 March 2023) <<https://justiceforsisters.wordpress.com/2023/03/17/media-statement-end-all-forms-harassment-against-organisers-and-participants-of-the-womens-march-malaysia-2023/>> accessed 30 October 2023

532 Audrey Dermawan, 'Nhaveen murder trial: High Court acquits and discharges 5 men without calling defence [NSTTV]' (New Straits Times, 3 October 2023) <<https://www.nst.com.my/news/crime-courts/2023/10/962434/nhaveen-murder-trial-high-court-acquits-and-discharges-5-men>> accessed 30 October 2023

533 Faisal Asyraf, 'T Nhaveen's mother in tears after AGC confirms appeal over acquittal' (Free Malaysia Today, 13 October 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/10/13/t-nhaveens-mother-in-tears-after-agc-confirms-appeal-over-acquittal/>> accessed 30 October 2023

534 Imram Hilmy, 'Family of killed teen to file civil suit against hospital, cops' (The Star, 4 October 2023) <<https://www.thestar.com.my/news/nation/2023/10/04/family-of--killed-teen-to-file-civil-suit-against-hospital-cops>> accessed 30 October 2023

options – to migrate, remain hidden or assimilate into majoritarian norms, or cisnormativity and heteronormativity.

STATE	MUSAHAQAH	LIWAT	SEXUAL INTERCOURSE AGAINST THE ORDER OF NATURE	SEXUAL INTERCOURSE BETWEEN PERSONS OF THE SAME GENDER	ATTEMPT TO COMMIT LIWAT	ATTEMPT TO COMMIT MUSAHAQAH	FEMALE PERSON POSING AS A WOMAN	FEMALE PERSON POSING AS A MAN	CHANGING GENDER
SELANGOR			X	X			X		
SABAH	X	X	X				X	X	
MELAKA	X	X	X		X		X	X	
N. SEMB	X	X	X				X	X	
KELANTAN	X	X			X*	X*	X		X
KEDAH	X	X					X	X	
PERLIS	X	X					X		
W.P	X	X					X		
P. PINANG	X	X					X		
JOHOR	X	X					X		
PAHANG							X	X	
PERAK	X						X		
TERENGGANU	X						X	X	
SARAWAK	X	X			X		X		
<b>TOTAL</b>	<b>12</b>	<b>10</b>	<b>4</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>14</b>	<b>6</b>	<b>1</b>



THE ABOLITION OF  
THE MANDATORY  
DEATH PENALTY  
– THE PATH  
AND WAY FORWARD

# THE ABOLITION OF THE MANDATORY DEATH PENALTY – THE PATH AND WAY FORWARD

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## **Introduction – Latest Amendments to the Law**

On 3 April 2023, Malaysia's Dewan Rakyat (Parliament's House of Representatives) passed two Bills, the *Abolition of Mandatory Death Penalty Bill 2023 (DR7)* and the *Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023 (DR8)*. These Bills were subsequently passed in the Dewan Negara (Senate), received the Royal Assent and became effective on 4 July 2023 and 12 September 2023 respectively.

This is significant for Malaysia towards the abolition of the death penalty. According to the Death Penalty Information Centre, the abolition of the death penalty is increasingly a global trend in recent decades<sup>535</sup>, as many countries have either abolished it or discontinued using it. Amnesty International's Death Sentences and Executions 2022 Global Report shows that as of December 2022<sup>536</sup>, almost three quarters of the countries in the world have abolished the death penalty in law or in practice (144 countries), with only 55 countries retaining capital punishment. Of the 144 countries, 112 countries abolished the death penalty for all crimes, 9 countries abolished it for ordinary crimes and 23 countries retained it, but have not carried out executions for at least the past 10 years<sup>537</sup>.

## **Malaysia's Progress Acknowledged**

Malaysia received international applause for this progress. Human Rights Watch called it "an important step towards aligning with international human rights norms and global opposition to capital punishment"<sup>538</sup>. United Nations Human Rights experts "hailed a decision by the Malaysia parliament to revoke the country's mandatory death penalty, a decision that could potentially spare the lives of 1300 prisoners"<sup>539</sup>.

Domestically, the news was widely reported. Momentum towards abolition of the mandatory death penalty has been building up since the previous government, where substantive consultations and advocacy helped in gaining consensus that the mandatory

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535 More information is available at: <https://deathpenaltyinfo.org/policy-issues/international>

536 Death Sentences and Executions 2022 (Amnesty International, 16 May 2023) <

<https://www.amnesty.org/en/documents/act50/6548/2023/en/>> accessed 16 February 2024

537 Ibid

538 'Malaysia Repeals Mandatory Death Penalty: Meaningful Move Should Pave Way to Full Abolition' (Human Rights Watch, 11 April 2023) < <https://www.hrw.org/news/2023/04/11/malaysia-repeals-mandatory-death-penalty>> accessed 16 February 2024

539 'Malaysia: UN experts hail parliamentary decision to end mandatory death penalty' (United Nations Human Rights Office of the High Commissioner, 11 April 2023) <<https://www.ohchr.org/en/press-releases/2023/04/malaysia-un-experts-hail-parliamentary-decision-end-mandatory-death-penalty>> accessed 16 February 2024

death penalty should be abolished, and the courts be given the discretion to deliver the appropriate sentence. Thus, the Bills were passed with no strong objection or pushback.

In a nutshell, the Acts:

1. abolish the mandatory death penalty for 12 offences<sup>540</sup> and replace it with life imprisonment of 30-40 years and 12 strokes of the cane;
2. abolish the death penalty for seven offences<sup>541</sup> and replace it with life imprisonment of 30 - 40 years and 12 strokes of the cane;
3. abolish natural life imprisonment and replace it with life imprisonment of 30-40 years;
4. introduce transitional measures to ensure that the amended punishment is applicable to those who are already undergoing trials or have been convicted;
5. introduce a revision mechanism by granting the Federal Court a temporary jurisdiction to review the death sentence and natural life imprisonment for those who have already exhausted legal remedies; and
6. repeal the conditions in Section 39B(2A) and (2B) of the Dangerous Drugs Act 1952, to make it a full discretion of the Court in deciding whether death penalty or the alternative punishment of life imprisonment (30-40 years) and 12 strokes of the cane, is suitable for a drug trafficking case.

The Acts have effectively reduced the number of crimes punishable with death; removed the mandatory nature of the death penalty for all crimes, thus giving the Court the discretion in sentencing; taken away imprisonment by natural life; and provided a resentencing process for people who have been sentenced to death mandatorily and are on death row to have mitigation factors reconsidered.

The Prime Minister's Department's (*Jabatan Perdana Menteri*, JPM) Legal Affairs Division (*Bahagian Hal Ehwal Dan Undang-Undang*, BHEUU) issued a press statement outlining the policy decision<sup>542</sup> on this commendable reform. The statement shows that the government seems to have taken into consideration that the death penalty should not be imposed for offences that do not result in the death of a victim. For example, for Sections 3 and 3A of the Firearms (Increased Penalties) Act 1971, relating to discharge or accomplices to discharge of firearms with intent to cause death or hurt when committing or attempting to commit an offense, the death penalty is completely removed and replaced with 30-40 years of imprisonment and whipping.

Many view this as a "baby step" towards the total abolition of the death penalty, by first removing the mandatory death penalty, and by reducing the number of offences punishable with death. However, it still falls short of the international standard, as the

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540 Penal Code: 121A, 130C, 130I, 130N, 130O, 130QA, 130ZB, 302, 374A, Firearms Act: 3, 3A, Dangerous Drugs Act: 39B

541 Penal Code: 307(2), 364; Firearms Act: 3, 3A, 7, 14; Kidnapping Act: 3(1)

542 'Kenyataan Media RUU Pemansuhan Hukuman Mati Mandatori 2023 dan RUU Semakan Hukuman Mati dan Pemenjaraan Sepanjang Hayat (Bidang Kuasa Sementara Mahkamah Persekutuan) 2023' (Bahagian Hal Ehwal Undang-Undang Jabatan Perdana Menteri, 27 March 2023) <<https://www.bheuu.gov.my/index.php/media/kenyataan-media/2657-kenyataan-media-ruu-pemansuhan-hukuman-mati-mandatori-2023-dan-ruu-semakan-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-bidang-kuasa-semantara-mahkamah-persekutuan-2023>> accessed 16 February 2024

death penalty remains applicable for offences that do not meet the threshold of the “most serious crime” under international law<sup>543</sup>, most notably drug trafficking.

It is also concerning that the sentence of mandatory whipping is maintained, together with 30- 40 years of imprisonment, as an alternative to the death penalty for certain offences that did carry whipping before the amendments. Corporal punishment constitutes a cruel, inhumane, and degrading treatment, and is prohibited under international law. Prior to this legislative change, whipping consisted of 15 strokes of the cane - it has now been reduced to 12 strokes of the cane, which is perhaps an acknowledgment - albeit a grossly inadequate concession - of the abhorrent nature of this practice.

### **Path to Abolition**

The death penalty in Malaysia is a British colonial legacy. It was first used during the Malayan Emergency (1948-1960) for insurgent offences, largely for unlawful possession of arms and ammunition, and was extended to anyone convicted of extorting food and money on behalf of the insurgents. In 1957, the Federation of Malaya declared independence, and a Federal Constitution was enacted. When the Federation of Malaysia was formed in 1963, the Federal Constitution was amended to include Sabah, Sarawak and Singapore (which left the Federation in 1965). The fundamental right to life is enshrined in Article 5 of the Federal Constitution.

Though the Federal Constitution guarantees the right to life, it also provides for the legality of the death penalty: “*No person may be deprived of life or personal liberty except in accordance with law*”. Existing laws that impose the death penalty remain in force and constitutional.

In the 1970s and 1980s, the increased use of drugs became a national problem. In combating this, the government introduced various legislative reforms, including the presumption of guilt to establish the elements of drug trafficking (in 1977) and the mandatory death penalty (in 1983) under Section 39B of the Dangerous Drugs Act 1952.

However, the use of the death penalty remains a constant debate amongst rights activists and lawyers. Legal attempts were made to challenge the constitutionality of the death penalty, notably by the late Karpal Singh s/o Ram Singh, who argued that the imposition of the death penalty was unconstitutional in the case of *Public Prosecutor v Lau Kee Hoo*<sup>544</sup>. Though unsuccessful, the case remains a leading authority on the issue. The Malaysian Bar Council in its Annual General Meeting in 1986 declared its anti-death penalty stance for the first time and since then, similar resolutions were adopted regularly and became more and more visible and publicly known. In 2009, Malaysia's National Human Rights Commission, SUHAKAM, recommended the abolition of the death penalty.

Until the ‘*SaveVuiKong*’ campaign in 2010, discourse on the abolition of the death penalty remained largely elitist. Yong Vui Kong, a Malaysian citizen sentenced to death when he

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543 The ‘most serious crime’ is interpreted to be ‘crimes of extreme gravity, involving intentional killing’. See Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights (the right to life): [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf)

544 [1983] 1 MLJ 157

was 19 years old for drug trafficking in Singapore, drew overwhelming support from Malaysians from all walks of life. The case highlighted how the laws on drugs and the mandatory death penalty unfairly target vulnerable communities. Members of the public and lawmakers questioned the injustice that was dispensed on innocent drug mules and vulnerable groups from poor social-economic backgrounds. The campaign also focused on the importance of a 'second chance', emphasizing rehabilitation and making amends<sup>545</sup>. The campaign collected more than 100,000 signatures in Malaysia which were presented to Singapore's President by Vui Kong's family and activists. The news was widely reported nationally and internationally. Pictures of Vui Kong's mother and sisters in front of Singapore's Palace were on the front page of many major newspapers.

Since then, the abolition movement has become more visible and structured.

In 2013, in association with the Bar Council, the Death Penalty Project launched a research study conducted by the late Professor Roger Hood, Oxford University, on Malaysian citizens' attitudes and opinions towards the use of the death penalty. The report concluded that *"There would be little public opposition to abolition of the mandatory death penalty for drug trafficking, murder and firearms offences. Public support for the death penalty for murder is also lower than is perhaps assumed"*<sup>546</sup> In the survey questionnaires, participants were given detailed scenarios and backgrounds to the crime committed and asked if they would support the use of the death penalty in those circumstances. The report clearly showed that to many people who supported in principle the use of the death penalty, it need not be the ultimate punishment, if circumstances convinced them otherwise. Thus, the claim that the broad use of the death penalty has the overwhelming support of the public is a fallacy.

The report is a real shot in the arm for the abolition movement. Incidentally, in 2012, Singapore amended its drug laws and allowed a limited discretion for the Court to impose imprisonment terms instead of death for drug trafficking, which resulted in Yong Vui Kong's death sentence being commuted in November 2013 to life imprisonment and 15 strokes of the cane.

The abolition movement picked up momentum when it was joined by national, regional and international actors. There was intense advocacy and lobbying with the de facto Law Minister, parliamentarians and policymakers, and other stakeholders. Many local and international organisations joined forces in organising roundtable discussions and consultations, regional congresses, and bringing together experts on various thematic issues relating to the death penalty. Abolition activists also stepped up engagement with the general public by organising talks, forums, art exhibitions, creative competitions, interviews, mini lectures, movie screenings, and many more events.

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545 Lee Way Loon and Joseph Sipalan 'Wanted: 100,000 signatures to save Vui Kong' (Malaysiakini, 21 July 2010)

<<https://www.malaysiakini.com/news/137961>> accessed 16 February 2024

546 The report can be accessed here: <https://deathpenaltyproject.org/knowledge/the-death-penalty-in-malaysia/>

Meanwhile, a number of reports and studies were published, and short documentary films<sup>547</sup> produced, all illustrating the many flaws in the administration of the death penalty in Malaysia and prompting the government to reconsider the use of the death penalty.

In 2013, the Malaysia government demonstrated a change in attitude towards the death penalty during the United Nations Universal Periodic Review and reported that a study had been undertaken by the Attorney-General's Chambers to reform criminal justice, including the death penalty.

In 2017, the Dangerous Drugs Act 1959 (DDA) was amended to abolish, under very limited conditions, the mandatory death sentence for drug trafficking. The initial Bill copied substantially from the 2012 amendments in Singapore's drugs law where the Court can only replace the death penalty with imprisonment when the conditions (as listed in the amendments) are met, including the issuance of a Certificate of Substantive Assistance<sup>548</sup> by the Prosecution. This is problematic in many ways, most notably when the issuance of such certificates is done arbitrarily and, in some cases, discriminatory and showing double standards<sup>549</sup>. Many abolition activists and opposition leaders lobbied the government then to not follow the amendments in Singapore but to give full discretion to the Court in handing out drug trafficking convictions, reverting to the pre-1983 amendments the DDA.

Eventually, the amendments were passed, repealing the words "*shall be punishable with death*" for a conviction of drug trafficking, and replacing it with the allowance that the court may impose imprisonment for life if four conditions are satisfied: (1) no evidence of buying and selling at the time of arrest; (2) no involvement of agent provocateur; (3) is a courier and (4) assisted an enforcement agency in disruption drug trafficking activities within or outside of Malaysia<sup>550</sup>.

A study done by the Anti-Death Penalty Asia Network (ADPAN)<sup>551</sup> after the amendments found that the implementation by the Court was inconsistent, and the conditions are difficult to be met. Between March 2018 and October 2020, there were 38 cases where individuals were convicted of drug trafficking. Of these 38 cases, Section 39B(2A) of the Dangerous Drugs Act 1952 was considered in 11 cases, among which the Court accepted the discretion argument in 4 cases and rejected it in 7 cases. Some critics commented that with such conditions, the death penalty remains mandatory in practice as the Court is

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547 *Menunggu Masa* directed by Sherie Razak Dali and Seira Scaha Abu Bakar; *Ayahku Dr G* directed by Loh Jo Yee, Hidayah Hisham and Dominique Teoh

548 *Explainer: What is the Certificate of Substantive Assistance?* (Transformative Justice Collective, 29 May 2021) <<https://transformativejusticecollective.org/2021/05/29/explainer-what-is-the-certificate-of-substantive-assistance/>> accessed 16 February 2024

549 'Another Msian in death row in Singapore fails in his appeal' (New Straits Times, 27 November 2021) <<https://www.nst.com.my/news/nation/2021/11/749329/another-msian-death-row-singapore-fails-his-appeal>> accessed 16 February 2024

550 Section 39B(2A) Dangerous Drugs Act 1952 (repealed 2023)

551 Sara Kowal, Dobby Chew and Mai Sato, 'Discretion in law but not in practice: Malaysia's Dangerous Drugs Act' (Monash University, 19 July 2021) <<https://www.monash.edu/law/research/eleos/blog/eleos-justice-blog-posts/discretion-in-law-but-not-in-practice-malysias-dangerous-drugs-act>> accessed 16 February 2024

bound to only consider the 4 conditions, and no other mitigating circumstances that may be presented in a particular case.

Then came the 2018 General Election. For the first time since independence, Malaysia experienced a change of federal government. The people elected a government that promised, amongst others, the abolition of oppressive laws including the death penalty. In August 2018, the new government announced the Executive's Order of moratorium on executions. On 10 October 2018, the de facto Law Minister, the late Datuk Liew Vui Keong<sup>552</sup> announced that the government pledged to abolish the death penalty for all crimes. In December 2018, Malaysia voted for the first time in favour of a UN Resolution on the moratorium on the use of the death penalty<sup>553</sup>.

While these announcements were warmly welcomed by some segments, some others, especially murders victim families, came out strongly against them. They organised signature campaigns and demonstrations against abolition<sup>554</sup>, on the grounds of justice for murder victims and the deterrence effect of the death penalty, and called for the government to be 'tough on crime'. Public opinion was again polarised on this issue, which eventually led to a policy change with the government backing down on full abolition, as it announced in March 2019 that it only planned to abolish the mandatory death penalty, for which purpose a Special Committee to Review Alternative Punishments to the Mandatory Death Penalty was set up.

The committee members included the former Chief Justice of the Federal Court, a former Court of Appeal judge, a former government official, academics, the former Chief Judge of Malaya, the former solicitor general, a legal practitioner and a criminologist, all appointed for a duration of 3 months (September - December 2019). The Committee took a holistic consultative approach to the study by conducting townhall meetings and focus group discussions nationwide, obtaining expert opinions and meeting with murders' victim families, death row inmate's families and persons on death row themselves.

This policy stays despite the various changes of government since February 2020. In the meantime, the government carried out the moratorium on execution, while the court continued to sentence people to death.

Based on statistics by Amnesty International Malaysia, 469 executions have been carried out in Malaysia since independence<sup>555</sup>.

During this period, public discussion on the death penalty started to gain traction again as a result of the imminent execution of Nagaenthran K Dharmalingam, a Malaysian citizen sentenced to death in Singapore for drug trafficking. Similar to that of Yong Vui Kong's,

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552 'Death penalty to be abolished' (New Straits Times, 10 October 2018)

<<https://www.nst.com.my/news/nation/2018/10/419931/death-penalty-be-abolished>> accessed 16 February 2024

553 The said UN Resolution can be accessed here: <https://icomdp.org/unga/#2018>

554 'MCA Youth campaign against the abolition of the death penalty' (Malaysian Chinese Association, 21 November 2018)

<[http://www.mca.org.my/2/Content/SinglePage?\\_param1=16-082020-167286-08-202016&\\_param2=TS](http://www.mca.org.my/2/Content/SinglePage?_param1=16-082020-167286-08-202016&_param2=TS)> accessed 16 February 2024

555 Statistics and other information by Amnesty International about the death penalty landscape in Malaysia can be accessed here:

<https://www.amnesty.my/abolish-death-penalty/>

this case sparked international uproar that gave rise to a massive by local and international NGOs for Nagaenthran who was found to have borderline intellectual functioning, attention deficit hyperactivity disorder (ADHD) and an IQ of 69<sup>556</sup>. Government officials and the Yang di-Pertuan Agong Sultan Abdullah Ahmad Shah, the King of Malaysia<sup>557</sup>, came together to plead for clemency and halting the execution. Though it was not successful - Nagaenthran was executed on 27 April 2022 - calls for the abolition of the death penalty in Malaysia grew louder, while each execution deepened the public discourse on the use of the death penalty and its value.

On 8 June 2022, the cabinet under Prime Minister Ismail Sabri Yaakob agreed to abolish the mandatory death penalty. From July to September of the same year, the de facto Law Minister Datuk Seri Wan Junaidi Tunku Jaffar held consultations with various stakeholders including the Attorney-General's Chambers (AGC), the Ministry of Home Affairs, and the Prison Department to discuss the abolition bill with a view to reaching a consensus.

On 6 October 2022, the then government took the first step by tabling, for the first reading<sup>558</sup>, the amendments to seven separate laws<sup>559</sup> that carried the mandatory death penalty. The second reading was supposed to be tabled within the same sitting.

While the amendments were anything but ideal, the abolition movement was nonetheless elated by the news for their being tabled in Parliament at last. Two major concerns of the draft Bill were, first, the alternative punishment was one of natural life imprisonment (which was equally inhumane and degrading), and secondly, the amendments were not retrospective, meaning those who had been sentenced to death under the mandatory death penalty and exhausted their legal appeals, would not have the benefit of the new law. This was extremely concerning for lawyers acting for the death row inmates.

And just four days after the first reading, the 14th Parliament was dissolved on 10 October 2022. There was no second reading of the seven draft Bills.

Not only did the progress towards abolition of the mandatory death penalty not halt under the newly elected coalition government led by Pakatan Harapan (PH), it even gathered pace and became better managed. From January to March 2023, the Ministry and BHEUU held many consultations with various government agencies as well as the Conference of Rulers, and eventually made a cabinet decision to abolish the mandatory death penalty.

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556 Paras 71 and 77 of the judgment can be found here: [https://www.elitigation.sg/gd/s/2017\\_SGHC\\_222](https://www.elitigation.sg/gd/s/2017_SGHC_222)

557 Jason Thomas, 'Nagaenthran's appeal postponed' (Free Malaysia Today, 26 January 2022)

<<https://www.freemalaysiatoday.com/category/nation/2022/01/26/nagaenthrans-appeal-postponed/>> accessed 16 February 2024

558 '[UPDATED] Govt tables amendments to abolish mandatory death penalty for first reading' (The Vibes, 6 October 2022)

<<https://www.thevibes.com/articles/news/73417/govt-tables-amendments-to-abolish-mandatory-death-penalty-for-first-reading>> accessed 16 February 2024

559 The Dangerous Drugs Act 1952, Kidnapping Act 1961, Criminal Justice Act 1953, Arms Act 1960, Penal Code, Criminal Procedure Code, and Firearms Act 1960

The first reading of the two Bills was tabled at the Dewan Rakyat on 27 March 2023 and passed, followed by the second reading on 3 April 2023, which was also passed. The two Bills were then tabled at the Dewan Negara on 11 April 2023 and passed.

In anticipation of potential backlash from the public, BHEUU released press statements, Frequently Asked Questions (FAQs) and infographics to explain the differences between the mandatory death penalty and the discretionary death penalty. The Deputy Minister YB Ramkarpal went on national television to clarify that these amendments were introduced to abolish the mandatory death penalty only, and Malaysia still has in place the discretionary death penalty in that judges still retain discretion to impose capital punishment. All these efforts cushioned the possible pushback from the public like what happened before. And the Bills were passed and received Royal Assent without much incident.

With the Bills passed and coming into effect, the government, the Court and the lawyers now have to deal with the resentencing process, no doubt a huge task. Based on Amnesty International Malaysia, 840 death row inmates<sup>560</sup>, and 117 inmates with natural life imprisonment, were eligible to apply to the Federal Court for resentencing as of March 2023.

### **Sentencing Under Abolition of Mandatory Death Penalty Bill 2023 (DR7)**

The Abolition of Mandatory Death Penalty Act 2023 came into force on 4 July 2023. Under the Act, the court has the discretion to impose the death penalty or, as an alternative, imprisonment of life (30-40 years) with 12 strokes of the cane.

This means that every person sentenced to death or natural life under the mandatory sentencing regime would now have a mitigation hearing where evidence in relation to their individual circumstances can be considered by the court. While it is still too early to see how jurisprudence will develop in sentencing, it is however expected to be significant given that under the mandatory regime, judges had no option but to hand out the death sentence to the convicted.

The first case in which the new law was applied came to the court on 28 July 2023, involving two foreigners<sup>561</sup> who were sentenced to death by the High Court after they were found guilty of murdering a Grab driver. The Court meted out the death penalty, instead of the alternative punishment as argued by the defence counsels. It is unclear how the court came to this decision. Based on the news report, the Deputy Public Prosecutor cited the severity of the crime and deterrence as the basis for the death penalty.

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<sup>560</sup> 'Reforms of mandatory death penalty in Malaysia: What do the Bills say?' (Amnesty International, 29 March 2023)

<[https://www.amnesty.my/wp-content/uploads/2023/03/Amnesty-International\\_Analysis-of-the-Bills-to-Abolish-The-Mandatory-Death-Penalty-in-Malaysia\\_March-2023-3.pdf](https://www.amnesty.my/wp-content/uploads/2023/03/Amnesty-International_Analysis-of-the-Bills-to-Abolish-The-Mandatory-Death-Penalty-in-Malaysia_March-2023-3.pdf)> accessed 16 February 2024

<sup>561</sup> '2 foreigners to hang for strangling Grab driver' (Free Malaysia Today, 28 July 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/07/28/2-foreigners-to-hang-for-strangling-grab-driver/>> accessed 16 February 2024

Subsequent cases include:

- On 2 August 2023, the Court of Appeal upheld the death sentence of a convict on drug trafficking<sup>562</sup>;
- On 19 September 2023, the Federal Court upheld the conviction and death sentence of an unemployed man for killing three of his foster relatives<sup>563</sup>;
- On 26 September 2023, the Federal Court set aside the death sentence for a man convicted for murdering his girlfriend, and sentenced him to a maximum 40 years of imprisonment and 12 strokes of the cane<sup>564</sup>; and
- On 27 October 2023, the Court of Appeal allowed another appeal by an accused to reduce the charge and replace the death sentence with imprisonment and caning for causing death to the victim<sup>565</sup>.

In many jurisdictions, the court has a bifurcated trial, where there is separate sentencing hearing after the accused pleads guilty or is convicted, but this is not in practice in Malaysia. Hence, it is high time to look at the setting up of a sentencing council and sentencing guidelines, akin to the United Kingdom's Sentencing Council<sup>566</sup>, to promote consistency in sentencing while maintaining judicial independence. Justice is better served when all factors are considered and an appropriate and proportionate sentence given.

To that end, BHEUU announced that it is in the midst of studying the possibility of establishing a sentencing council to review all criminal sentences<sup>567</sup>.

### **Resentencing Process: Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023 (DR8)**

The Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023 came into force on 12 September 2023.

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562 'Appeals Court upholds death sentence on businessman for drug trafficking' (New Straits Times, 2 August 2023)

<<https://www.nst.com.my/news/crime-courts/2023/08/937940/appeals-court-upholds-death-sentence-businessman-drug-trafficking>> accessed 16 February 2024

563 'Death sentence confirmed for man who murdered 3 foster relatives' (Free Malaysia Today, 19 September 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/09/19/death-sentence-confirmed-for-man-who-murdered-3-foster-relatives/>> accessed 16 February 2024

564 'Federal Court commutes death sentence on former bus driver for murdering girlfriend to 40 years imprisonment, 12 whipping'

(The Malaysian Reserve, 26 September 2023) <<https://themalaysianreserve.com/2023/09/26/federal-court-commutes-death-sentence-on-former-bus-driver-for-murdering-girlfriend-to-40-years-imprisonment-12-whipping/>> accessed 16 February 2024

565 'Bunuh: Mahkamah rayuan ganti hukuman mati terhadap tiga lelaki dengan penjara' (Astro Awani, 27 October 2023)

<<https://www.astroawani.com/berita-malaysia/bunuh-mahkamah-rayuan-ganti-hukuman-mati-terhadap-tiga-lelaki-dengan-penjara-443577>> accessed 16 February 2024

566 Guidelines by the UK's Sentencing Council can be accessed here: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>

567 'Azalina: PM Dept's Legal Affairs Division studies sentencing council' (Malay Mail, 11 July 2023)

<<https://www.malaymail.com/news/malaysia/2023/07/11/azalina-pm-depts-legal-affairs-division-studies-sentencing-council/79088>> accessed 16 February 2024

Under the Act, those who were eligible to file an application to the Federal Court to review their respective sentences shall do so within 90 days from the day the Act came into force.

The media statement issued by BHEUU<sup>568</sup> on 11 September 2023 laid down the mechanism of the resentencing process. Principally, all eligible persons on death row will be legally represented, either through private engagement, a court-assigned lawyer, or the legal aid organisation, Yayasan Bantuan Guaman Kebangsaan (YBGK). The factors to be considered include age and health of the inmates, number of years already served, and other circumstances.

In order to expedite and manage the process, BHEUU released a flow chart to guide the public and lawyers<sup>569</sup>. In a nutshell, the respective prisons will first prepare the Notice of Application and Supporting Affidavit and file it to the Federal Court. This places the burden of filing an application within the 90-day timeframe on the prison. Once the case is listed, the lawyers (if already appointed) are informed or assigned to attend the case management hearing where the court directs the filing of further affidavits and written submissions. This is when the lawyers file additional affidavits, affirmed by the inmate himself/herself, family members or any other people, such as medical experts, in support of the mitigating circumstances. The Deputy Public Prosecutor can file an affidavit in reply and written submission to oppose the application. Once all documents are properly filed, a date will be fixed for hearing.

It is worth noting here that there has been some concern for the relatively short time frame allowed to gather relevant mitigation evidence before the hearing. Many on death row have significant medical and psychological conditions, which are relevant for mitigation purposes. International studies of persons on death row show that 62% of the 88 prisoners/prisoners' families interviewed for the study had at least one mental illness<sup>570</sup>. Many had never been assessed for the purpose of mitigation, given that the mandatory framework did not allow such evidence. There is concern in relation to the quick timeframes, funding and access to expert evidence. Many jurisdictions rely on forensic psychiatrists, psychologists and medical experts to guide them on appropriate individualised sentencing. Since Malaysia is building up its jurisprudence in this area, it is hoped that the court will allow for evidence to be obtained for those to whom it is relevant.

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568 'Kenyataan media: Penguatkuasaan Akta Semakan Hukuman Mati dan Pemenjaraan Sepanjang Hayat (Bidang Kuasa Sementara Mahkamah Persekutuan) 2023 [Akta 847] (Bahagian Hal Ehwal Undang-Undang Jabatan Perdana Menteri, 11 September 2023) <<https://www.bheuu.gov.my/index.php/media/kenyataan-media3/2960-kenyataan-media-penguatkuasaan-akta-semakan-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-bidang-kuasa-sementara-mahkamah-persekutuan-2023-akta-8471>> accessed 16 February 2024

569 The flow chart can be accessed here:

<https://www.bheuu.gov.my/pdf/MEKANISME%20PENGENDALIAN%20PERMOHONAN%20SEMAKAN.pdf>

570 Project 39A National Law University Delhi, 'Submissions to the Secretary-General's Report on the question of the death penalty in India (2020-2022)' <<https://www.ohchr.org/sites/default/files/2022-06/DP-HRC51-Project-39A.pdf>> accessed 16 February 2024

The first resentencing hearing happened on 14 November 2023. The government declared this day as a historical moment<sup>571</sup>. A total of 11 applications were heard, seven under the mandatory death sentence for drug trafficking, and four serving natural life imprisonment for drug trafficking and murder. All 11 of them had the death sentence commuted to life imprisonment, varying from 30 to 36 years, plus 12 strokes of the cane for those below the age of 50.

### Case Study

Rajendran A/L Muthumanickam was convicted under Section 302 read together with Section 34 of the Penal Code. The crime occurred on 12 March 1998. In brief, Rajendran, together with two co-accused, were charged for murder with common intention on four individuals, while committing burglary in a jewellery shop in Ipoh. He was sentenced to death by the High Court 1 November 1999 and the final appeal was dismissed on 16 February 2009. As of 2023, he has been incarcerated for 25 years.

Rajendran was raised in a family like many of us. His father was a civil servant working in the fire department, while his mother is a housewife. He is the first born, followed by three sisters. Rajendran completed 12 years of education, and joined the police force when he was 19 years old. Life seemed promising as he married his wife the following year. The happiness was short-lived, as his father died in a car accident just one year after his marriage. Grief ensued and life changed forever for him and his family. Rajendran felt lost, and struggled with his own conscience as he was exposed to the “dark side” within the police force. At one wee morning hour, he was arrested for murder with common intention while committing burglary, and the case made headlines.

Throughout his trials and appeal, Rajendran maintained that he did not commit the crime of murder, and that all evidence against him was circumstantial. In fact, he cooperated with the police during the investigation.

On 12 June 2014, Rajendran received a letter informing him that the death sentence had been commuted by the Sultan of Perak. He is now to serve life imprisonment. While grateful, he knows prison life is dim and hopeless.

The news that the government was going to abolish the death penalty excited many of the death row inmates, and their families. However, it was uncertain for people like Rajendran who have exhausted all legal processes and have received pardon on the death sentence. He keeps asking if the abolition will help him. As far as he was concerned, he would never be a free man unless his life sentence could be further reduced to a certain number of years in prison. Only then could he look forward to the day of release.

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571 'Kenyataan media: Semakan kes hukuman mati dan pemenjaraan sepanjang hayat di bawah Akta Semakan Hukuman Mati dan Pemenjaraan Sepanjang Hayat (Bidang Kuasa Sementara Mahkamah Persekutuan) 2023 [Akta 847]' (Bahagian Hal Ehwal Undang-Undang Jabatan Perdana Menteri, 14 November 2023) <<https://www.bheuu.gov.my/index.php/media/kenyataan-media3/3111-kenyataan-media-semakan-kes-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-di-bawah-akta-semakan-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-bidang-kuasa-sementara-mahkamah-persekutuan-2023-akta-847>> accessed 16 February 2024

Under the Act DR8, Rajendran is eligible for resentencing. His application was fixed for hearing with the first batch. While preparing for the relevant court papers, Rajendran's legal team interviewed him and his family, and took great effort to make written submissions, laying down all the legal principles and case precedents from jurisdictions like India and Australia.

On 14 November 2023, the court room was filled with counsels, family members and reporters. As seats were limited, one needed to pre-register to enter the courtroom. Also present were representatives from NGOs, BHEUU, and the prison department. Many were watching as the cases were called, with the decisions being read out one by one. There was a subtle sound of relief from the room when the first decision was pronounced. It looks like for drug trafficking; all death sentences were replaced with life imprisonment (30-40 years) and 12 strokes of the cane for those under the age of 50.

When Rajendran's case was called, his counsel Rashid Ismail argued for 30 years imprisonment, while the Public Prosecutor argued for the maximum of 40 years. Eventually, the court granted 36 years commencing from the date of arrest. After deducting the one-third remission, Rajendran only needed to serve 24 years, which he had already served. The prison released him on that very same day and he walked out of the prison to the warm embrace of his wife and ageing mother.

It is still a fact that Rajendran is grappling with, that he is now a free man. Life after release is another challenge as he slowly adapts to the changed world and rebuilds his life.

In the subsequent resentencing hearings, there were at least two cases<sup>572</sup> where the Federal Court affirmed the death sentence, both for murder.

Until the grounds of such decisions are publicly available, it is unclear how the court came to these conclusions. Some lawyers are concerned that due considerations were not given to the mitigating circumstances such as the mental condition of the death row inmates. It is also disturbing to note that in some cases, lawyers were not given a copy of the Record of Appeals and Notes of Proceeding of the trial and appeals, and/or a medical or mental health assessment report to prepare for the sentencing hearings.

### **Recommendations**

To safeguard civil liberties, protect the fundamental values of Malaysia's democratic system, and put in place a fair resentencing process, the government should:

1. ratify the International Covenant on Civil and Political Rights and the Second Optional Protocol of the Covenant, align the national legal framework, and ultimately abolish the death penalty;

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<sup>572</sup> See cases here: <https://www.freemalaysiatoday.com/category/nation/2024/01/04/apex-court-affirms-death-sentence-of-ex-guard-who-murdered-colleagues/>; <https://www.nst.com.my/news/crime-courts/2024/02/1010077/5-death-row-sabah-spared-gallows#>

2. establish a Sentencing Council to review sentencing practices for all offences, including capital crimes;
3. abolish corporal punishment;
4. release comprehensive and detailed statistics on the use of the death penalty in Malaysia.



CLIMATE CRISIS:  
CODE RED TO HUMANITY

# CLIMATE CRISIS: CODE RED TO HUMANITY

*Author: Ili Nadiyah Dzulfakar*

The escalating climate crisis represents a formidable challenge to human rights across the globe, manifesting in widespread adversity that endangers the fundamental human rights to life, health, and a sustainable environment. The pressing need for immediate and significant action is underlined by the inadequate pace of current efforts to limit global warming to 1.5°C—aimed at averting irreversible environmental damage and mitigating dire consequences. The United Nations Human Rights Council has played a pivotal role in stressing the profound link between climate change and human rights, enacting 13 resolutions between 2008 and 2021 that frame climate change as an overarching human rights issue. These resolutions advocate for the integration of human rights considerations into climate action and policy development, emphasising the necessity for international collaboration and robust legal frameworks to protect life and health against the adverse effects of climate change.

The first Global Stocktake<sup>573</sup> indicates that, to limit global warming to 1.5°C, greenhouse gas (GHG) reductions of 43% by 2030 and 60% by 2035, relative to 2019 levels, are needed, with the goal of achieving net-zero CO<sub>2</sub> emissions by 2050. This daunting task necessitates comprehensive transformations across all sectors, including the ramp-up of renewable energy sources, the complete phase-out of unabated fossil fuels, cessation of deforestation activities, reduction of non-CO<sub>2</sub> emissions, and the adoption of measures affecting both the supply and demand sides of the energy equation.

Amidst this backdrop, the UN Environment Programme's 2023 Emissions Gap Report<sup>574</sup> indicates that the world is on a trajectory towards a temperature increase of 2.5-2.9°C above pre-industrial levels by this century's end under current Paris Agreement pledges—a stark reminder of the urgent necessity for escalated climate action. The 2023 Adaptation Gap Report<sup>575</sup> indicates that finance for climate change adaptation provided to developing nations is drastically inadequate, covering just 10% of the estimated \$215 billion needed annually. This gap highlights an urgent need for increased financial support, with current funding falling 10 to 18 times short of requirements.

The climate crisis presents a stark disparity in impact, hitting hardest those in low-income countries and marginalised communities within wealthier nations and emerging economies. These groups, most susceptible to the devastating effects of climate change, lack the resources to effectively mitigate and adapt. This reality stresses the critical need for climate action that is not only robust and immediate but also inclusively designed to address the vulnerabilities of those most at risk. The "era of global boiling" spotlights the nexus between climate crisis and human rights which demands a concerted, fair, fast and

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573 The First Global Stocktake report can be accessed here: [https://unfccc.int/sites/default/files/resource/cma2023\\_L17\\_adv.pdf](https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf)

574 The Emissions Gap Report can be accessed here: <https://www.unep.org/resources/emissions-gap-report-2023>

575 The Adaptation Gap Report can be accessed here: <https://www.unep.org/resources/adaptation-gap-report-2023>

unified response. Through the adoption of targeted resolutions and the mobilisation of international efforts, the global community, developed nations and businesses must prioritise and integrate human rights protections into the fabric of climate policies and actions, ensuring the safeguarding of essential human rights against the threats posed by the climate crisis.

### **Climate Impacts in Malaysia**

*From SUARAM's 2023 Malaysia Human Rights Report Overview*

2023 bore witness to the ramifications of climate change in Malaysia, with dire human rights implications. Just over a year following the 2021 mega flood, Johor experienced another devastating flood, reputed as the worst in recent memory. Over a span of two weeks, continuous rainfall displaced 82,000 people, culminating in the tragic loss of five lives<sup>576</sup>. Although the full extent of the economic loss remains undisclosed, preliminary assessments have pinpointed damages to roads and infrastructure exceeding RM168 million<sup>577</sup>, with the agricultural sector suffering losses amounting to RM35.5 million<sup>578</sup>.

By May 2023, Malaysia grappled with an intense heatwave that led to the unfortunate deaths of two children<sup>579</sup>. Such events, set against the backdrop of rising temperatures across Asia and the anticipated repercussions of El Niño, highlight the urgency on public health and community preparedness.

Moreover, the recent surge in Malaria cases, as identified by public health experts, is linked to the climate change<sup>580</sup>. An increased prevalence of mental health issues, stemming from the stress and trauma of these climate disasters are well documented.

Food security, an essential human right, is also under threat. Recent floods have wreaked havoc on Johor's agriculture, causing 929 farmers in the state to apply for flood relief aid following losses of over RM17 million, with a total of 60 operators in the fishery sector incurring damages amounting to approximately RM5.234 million<sup>581</sup>. Unpredictable weather patterns in 2023 led to a staggering 50% reduction in vegetable

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576 Zahratulhayat Mat Arif, 'Part of RM150m funds for flood relief to be used to instal Bailey bridges in Johor' (New Straits Times, 18 March 2023) <<https://www.nst.com.my/news/nation/2023/03/890361/part-rm150m-funds-flood-relief-be-used-instal-bailey-bridges-johor>> accessed 1 March 2024

577 Yee Xiang Yun, 'Floods: At least RM168mil needed for infrastructure repairs, says Johor exco member' (The Star, 14 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/14/floods-at-least-rm168mil-needed-to-repair-infrastructure-says-johor-exco-member>> accessed 1 March 2024

578 Yee Xiang Yun, 'Fresh produce to cost more in Johor due to floods' (The Star, 13 March 2023) <<https://www.thestar.com.my/news/nation/2023/03/13/fresh-produce-to-cost-more-in-johor-due-to-floods>> accessed 1 March 2024

579 Press Release: Gabungan Darurat Iklim Malaysia (GDIMY) Demands Urgent Action on Heat Stroke-Related Deaths in Malaysia <<https://docs.google.com/document/d/1JewcyMLiOvifoTZxWhBldxubfyfBqilz5ISxKyYe3oE/edit>>

580 Ragananthini Vethasalam, 'Malaria makes a scary comeback' (The Star, 2 October 2023) <<https://www.thestar.com.my/news/nation/2023/10/02/malaria-makes-a-scary-comeback>> accessed 9 November 2023

581 'More than nine hundred farmers apply for assistance following RM17 million in losses due to floods' (New Straits Times, 15 June 2023) <<https://www.nst.com.my/news/nation/2023/06/920518/more-nine-hundred-farmers-apply-assistance-following-rm17-million-losses>> accessed 9 November 2023

production in the Cameron Highlands, resulting in a consequential doubling of prices<sup>582</sup>. Cumulatively, the nation's agriculture and agro-food sectors reported losses of around RM111.95 million, following the recent monsoon season with the damages covering 24,500ha of land involving some 12,000 farmers and breeders nationwide<sup>583</sup>. Malaysia is introducing government-supported insurance schemes, including the Agro-food insurance<sup>584</sup> and Padi Crop Takaful Scheme<sup>585</sup>, to bolster food security and supplement the existing Padi Crop Disaster Fund (TBTP). However, glaringly absent from these interventions is the consideration of farmers' physical and mental well-being throughout these disaster cycles.

In light of these realities, it is paramount for the government to address the human rights implications forthwith, prioritising the welfare and wellbeing of the nation's most vulnerable.

### 1.0 Malaysia's Energy Transition and Human Rights Implications

Malaysia aims to reduce their greenhouse gas (GHG) emissions intensity of GDP by 45% by 2030 relative to the emissions intensity of GDP in 2005. In December 2023, the Malaysian government executed a strategic reorganisation, dividing the Natural Resources, Environment and Climate Change Ministry (NRECC) into the Ministry of Natural Resources and Environmental Sustainability, and the Ministry of Energy Transition and Public Utilities. This initiative is aimed at intensifying Malaysia's commitment towards environmental sustainability and facilitating a focused energy transition to achieve the nation's net-zero carbon emissions target by 2050. Deputy Prime Minister Datuk Seri Fadillah Yusof took the helm of the newly established Ministry of Energy Transition and Public Utilities, highlighting the government's resolve towards advancing sustainable energy development. Despite the restructure, there has been no subsequent portfolio announcement from the Ministry of Energy Transition and Public Utilities, creating an atmosphere of anticipation for its strategic priorities and actions.

During his leadership of NRECC, Nik Nazmi played a pivotal role in revoking Malaysia's renewable energy export ban and actively contributed to the formulation

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582 'Daily showers bring vegetable shortage and price woes' (The Star, 8 February 2023)

<<https://www.thestar.com.my/news/nation/2023/02/08/daily-showers-bring-vegetable-shortage-and-price-woes>> accessed 9 November 2023

583 Sharifah Mahsinah Abdullah, 'Farmers suffer RM111 million losses due to recent floods' (New Straits Times, 5 January 2023)

<<https://www.nst.com.my/news/nation/2023/01/867557/farmers-suffer-rm111-million-losses-due-recent-floods>> accessed 9 November 2023

584 Nor Ain Mohamed Radhi, 'Agrofood insurance scheme in final stages, says Kiandee' (New Straits Times, 5 July 2022)

<<https://www.nst.com.my/news/nation/2022/07/810919/agrofood-insurance-scheme-final-stages-says-kiandee>> accessed 9 November 2023

585 'Takaful Scheme for paddy crops to be launched soon' (Selangor Journal, 28 February 2023)

<<https://selangorjournal.my/2023/02/takaful-scheme-for-paddy-crops-to-be-launched-soon/>> accessed 9 November 2023

of the National Energy Transition Roadmap (NETR)<sup>586</sup>, a collaborative effort led by three ministries. The future placement of the NETR, heralded as a "living document" since its inception in late August under the leadership of the Ministry of Economy, within the domain of the newly formed energy transition ministry remains uncertain. Stakeholders are keenly awaiting further clarification, hoping for an updated edition of the NETR that reflects the post-reshuffle ministerial landscape and identifies new focal areas for championing Malaysia's energy transition and environmental sustainability efforts.

### 1.1 National Energy Transition Roadmap (NETR)

The energy sector comprises 80% of GHG emissions in Malaysia. Despite that, Malaysia's GHG emission profile is just 0.8% globally. Malaysia's approach to transitioning towards a net-zero emissions economy, as outlined in the NETR, presents both opportunities and challenges from a human rights perspective. The roadmap's ambitious goals, aimed at increasing renewable energy usage, juxtapose a conservative strategy that may inadvertently perpetuate reliance on fossil fuels, such as fossil gas. This cautious approach risks not only environmental degradation but also economic vulnerabilities, especially for communities dependent on sustainable environments.

Financial and technological hurdles further complicate the transition, spotlighting a vital need for clear policy direction and infrastructure rethinking. The roadmap's current trajectory — favouring natural gas as a transitional fuel and exploring new gas fields — raises concerns about Malaysia's long-term environmental sustainability and energy security, increases the risk of stranded assets and is intrinsically linked to the human rights to health, clean water, and a safe, clean, healthy, and sustainable environment. The Production Gap Report 2023<sup>587</sup> reveals that new fossil fuel development is proceeding at a pace 110% higher than what is consistent with limiting warming to 1.5 degrees.

Critics of the roadmap call for a more balanced energy transition that reduces environmental and economic risks by exploring alternatives to natural gas, such as renewable sources equipped with ancillary services. Such a shift would not only align with global climate goals but also safeguard human rights by promoting environmental justice and mitigating the adverse impacts of climate change on vulnerable populations.

It is essential to recognise the connection between energy policy, environmental sustainability, and human rights. Malaysia's energy transition, while ambitious, requires a reassessment to ensure that it promotes not just economic growth and energy security but also the protection of human rights and the environment.

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586 The NETR can be accessed here: [https://www.ekonomi.gov.my/sites/default/files/2023-09/National%20Energy%20Transition%20Roadmap\\_0.pdf](https://www.ekonomi.gov.my/sites/default/files/2023-09/National%20Energy%20Transition%20Roadmap_0.pdf)

587 The Production Gap Report can be accessed here: <https://www.unep.org/resources/production-gap-report-2023>

## 1.2 Is Just Energy Transition Possible?

This discussion circles back to the crucial concept of a Just Transition within Malaysia's energy sector, which remains in its infancy and largely unaligned with principles of fairness. Oxfam's definition of a Just Energy Transition (JET) emphasises the importance of integrating justice and human rights into the shift towards sustainable energy sources that "reduces inequality, shifting the costs of climate action onto wealthy polluters while prioritising economic, racial, and gender justice"<sup>588</sup>. Despite Petronas issuing guidelines on JET<sup>589</sup>, they fall short of capturing the full essence of Just Transition<sup>590</sup>, which fundamentally revolves around various forms of justice, including climate, gender and development justice — a concept deeply intertwined with human rights yet lacks a clear and legal definition in Malaysia within the context of JET. Without identifying specific rights infringements during the energy transition, developing a comprehensive and actionable JET framework proves challenging. Effective social dialogue for stronger consensus, as suggested by the ILO Just Transition Guidelines, is crucial for integrating labour perspectives into climate policies, ensuring that the move towards renewable energies also translates into quality job opportunities locally that aligns workers' interests with environmental goals.

Given the significance of the energy sector in Malaysia, incorporating Business and Human Rights (BHR) principles is essential for defining and operationalising JET. The transition's impact on job security, especially in fossil fuels, cannot be overlooked. Essential elements currently absent from JET discussions include the involvement of labour unions in social dialogues, the recognition of women and care work within the energy transition, and the gendered nature of access to energy resources and decision making. Addressing these overlooked aspects is vital for ensuring that the transition not only advances environmental and economic goals but also upholds justice and equity, making the transition truly "just."

## 1.3 Energy Efficiency and Conservation Bill

The NRECC introduced the Energy Efficiency and Conservation Bill (EECA) in Malaysia's Parliament to complement the NETR, where it was successfully

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588 Kate Constantine 'What is a just energy transition?' (Oxfam America, 11 December 2023)

<<https://www.oxfamamerica.org/explore/stories/what-is-a-just-energy-transition/>> accessed 1 March 2024

589 Petronas and PwC Malaysia, 'Laying the foundation for a just energy transition' (November 2023)

<<https://www.petronas.com/sites/default/files/uploads/content/2023/Laying%20the%20Foundation%20for%20a%20Just%20Energy%20Transition.pdf>> accessed 1 March 2024

590 International Labour Organization, 'Guidelines for a just transition towards environmentally sustainable economies and societies for all' <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/documents/publication/wcms\\_432859.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_432859.pdf)> accessed 1 March 2024

passed by the Dewan Rakyat<sup>591</sup>. The bill aims to enforce energy efficiency across large industrial and commercial sectors, office buildings, and energy-using products. Upon implementation, the EECA is expected to yield energy savings of 2,017 million GJ, equating to an economic saving of around RM100 billion, while also aiming to reduce carbon emissions by nearly 200,000 kilotons, thereby contributing to Malaysia's net-zero GHG emissions goal by 2050, targeting the demand-side energy management. However, the bill encountered resistance from senators representing Sarawak for the second reading, a state that uniquely holds autonomy over its electricity supply and distribution<sup>592</sup>. This distinct status led to a notable delay in the bill's progression through the Dewan Negara, as the eight Sarawakian senators called for specific amendments to the legislation. This situation spotlights the nuanced dynamics of federal-state relations in Malaysia, particularly in the context of energy policy and legislative processes, illustrating the complexities of implementing national policies in a federated system with diverse regional interests.

#### 1.4 Race to Non-Radioactive Rare Earth Elements (NR-REEs)

SUARAM's 2022 Malaysia Human Rights Report documented Malaysia's initiative to revamp its mining sector, focusing on creating a sustainable non-radioactive rare earth elements (NR-REEs) industry amid rising global demand for minerals. Malaysia's rich NR-REE reserves, estimated at 16.1 million metric tonnes with a value of RM1 trillion, position it as a key player in the sector. With upstream activities spanning from mining to midstream<sup>593</sup> activity such as manufacturing, including EV batteries, the industry's downstream production is expected to hit RM13.73 billion by 2030<sup>594</sup>. This growth is primarily seen in super magnet and electric motor production, hinting at broader applications in electronics, medical equipment, and more, showcasing Malaysia's potential in the global NR-REE market.

Malaysia is shifting towards adding more value to its rare earth elements (REE) industry through advanced downstream processing. This shift, however, has sparked environmental and public health concerns, especially with the historical hazardous waste issues from companies like Asian Rare Earth (ARE) and Malaysian Rare Earth Corporation Plant (MAREC) in Perak, leading to their

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591 Izzul Ikram and Choy Nyen Yiau, 'Energy Efficiency and Conservation Bill tabled in Dewan Rakyat for first reading' (The Edge Malaysia, 9 October 2023) <<https://theedgemaalaysia.com/node/685396>> accessed 1 March 2024

592 Sulok Tawie, 'Putrajaya delays power conservation law in Senate over Sarawak lawmakers' autonomy concern' (Malay Mail, 6 December 2023) <<https://www.malaymail.com/news/malaysia/2023/12/06/putrajaya-delays-power-conservation-law-in-senate-over-sarawak-lawmakers-autonomy-concern/106150>> accessed 1 March 2024

593 Ministry of Science, Technology and Innovation, and Akademi Sains Malaysia, 'Blueprint for the establishment of rare earth-based industries in Malaysia: A strategic new source for economic growth' <<https://www.akademisains.gov.my/asm-publication/blueprint-for-the-establishment-of-rare-earth-based-industries-in-malaysia-full-report/>> accessed 1 March 2024

594 Choy Nyen Yiau, 'Malaysia foresees RM13.73 bil downstream production of non-radioactive rare earth elements by 2030' (The Edge Malaysia, 25 October 2023) <<https://theedgemaalaysia.com/node/687629>> accessed 1 March 2024

closure<sup>595</sup>. Lynas' operations since 2012 and the risk of deforestation in carbon-rich areas<sup>596</sup> with REE deposits have further fuelled these concerns.

The surge in rare earth mining interest has also led to illegal mining activities in Kedah and Negeri Sembilan, with some states exploring and exporting REEs. Despite the potential benefits, discussions on fair mineral rent distribution and an export ban on non-radioactive REEs to promote domestic industry are lacking. A pilot project in Kenering, Hulu Perak, for example, generated nearly RM16 million in royalties from exporting non-radioactive elements to China<sup>597</sup>.

To balance economic gains with human rights and environmental protection, The ISEAS-Yusof Ishak Institute<sup>598</sup> emphasises the need for clear economic strategies backed by strong governance, transparency, and legal accountability. This approach aligns with United Nations human rights principles and includes efforts to safely manage radioactive waste, demonstrating Malaysia's commitment to sustainable practices in the REE sector.

In the downstream sector, the New Industrial Master Plan 2030 (NIMP 2030), through budget incentives through the National Automotive Policy (NAP) aims to introduce locally manufactured EVs<sup>599</sup>. However, enhancing urban mobility must involve expanding the role of electric vehicles (EVs) beyond revitalising the automotive industry through personal mobility to align with Malaysia's energy transition strategies. The primary focus should be on bolstering public transportation systems with EV technology to ensure widespread, convenient access, aiming to elevate public transport usage from under 10% to 70%<sup>600</sup>. Personal EV use should be an alternative, not a necessity, with a broader strategy that includes making cities more pedestrian-friendly and enhancing rural mobility to provide sustainable transport solutions for all. Additionally, there are critiques that prioritising EVs for personal use without consumption behavioural change might increase total electricity demand<sup>601</sup>, whereas leveraging EVs for a

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595 Tham Siew Yen, 'The race for critical minerals in Malaysia: Upstream, mid-stream, or downstream?' (Fulcrum, 24 August 2023)

<<https://fulcrum.sg/the-race-for-critical-minerals-in-malaysia-upstream-mid-stream-or-downstream/>> accessed 1 March 2024

596 Further information about the issue can be found here: [https://foe-malaysia.org/article\\_tags/rare-earth-minerals/](https://foe-malaysia.org/article_tags/rare-earth-minerals/)

597 Choy Nyen Yiau, 'Ex-minister questions if Perak violated federal govt policy after exporting rare earth elements' (The Edge Malaysia, 19 October 2023) <<https://theedgemaalaysia.com/node/686817>> accessed 1 March 2024

598 Tham Siew Yen and Neo Hui Yun Rebecca, 'Malaysia's return to mining: Redeveloping rare earth elements (REE)' (ISEAS-Yusof Ishak Institute, 2023) <<https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2023-97-malaysias-return-to-mining-redeveloping-rare-earth-elements-ree-by-tham-siew-yeen-and-neo-hui-yun-rebecca>> accessed 1 March 2024

599 Information about the launch of NIMP 2030 can be found here: <https://www.mida.gov.my/launch-of-the-new-industrial-master-plan-2030-nimp-2030/>

600 Muhamad Nazri Borhan, Deprizon Syamsunur, Norlizah Mohd Akhir, Muhamad Razuhanafi Mat Yazid, Amiruddin Ismail and Riza Atiq Rahmat, 'Predicting the use of public transportation: A case study from Putrajaya, Malaysia' (Hindawi, 9 July 2014) <<https://www.hindawi.com/journals/tswj/2014/784145/>> accessed 1 March 2024

601 Stephen Hall, 'As more electric vehicles hit the road, our charging habits must change - here's why' (World Economic Forum, 11 January 2023) <<https://www.weforum.org/agenda/2023/01/electric-cars-charging-habits/>> accessed 1 March 2024

well-planned public transportation system can more effectively support the overall energy transition and improve public health<sup>602</sup>.

## 1.5 Sarawak's Energy Transition and Climate Governance

Sarawak's anti-climate change legislative advancements, notably the Environment (Reduction of Greenhouse Gas Emission) Bill 2023 and the Land (Carbon Storage) Rules 2022, and Forests (Forest Carbon Activity) Rules 2022, illustrate the state's proactive stance<sup>603</sup> in enabling industries, including oil and gas, to comply with international CO2 emission reduction standards under the UN Framework Convention for Climate Change and became the first Malaysian state to do so. The Environment (Reduction of Greenhouse Gas Emission) Bill 2023 mandates businesses to report on greenhouse gas emissions annually and potentially pay carbon levy for exceeding emission thresholds without a decarbonization plan. The enactment of the bill showcases Sarawak's aim in achieving net-zero carbon emissions by 2050 through carbon capture, emission reduction, and carbon credit-based mitigation projects.

### *Oversight of Petroleum-Related Emissions*

Sarawak has a significant role in Malaysia's oil production, particularly in the Sarawak Basin. The legislation's provision for strict regulation of petroleum-related activities also includes prohibitions on unregulated flaring or venting of gases, underlining the state's aim to reduce emissions from one of its key industries.

However, while these actions signify positive strides, they also bring to light critical areas requiring urgent attention. The impact of such environmental policies on the human rights of Sarawak's Indigenous Peoples, especially concerning land rights and deforestation, remains a significant concern as the state transitions into a low carbon economy. The balance between ambitious environmental goals and the protection of these communities' rights and livelihoods warrants a nuanced examination. The involvement of Sarawak in large-scale hydropower projects and the expansion of oil and gas activities relying on just the economic benefits rationale, have elicited criticism for their environmental and social implications. In response to climate change legislation<sup>604</sup>, Sarawak is set to form a climate change advisory panel<sup>605</sup>.

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602 Benedict Lopez, 'Why free public transport is the way to go for Malaysia' (Aliran, 26 October 2023) <<https://aliran.com/thinking-allowed-online/why-free-public-transport-is-the-way-to-go-for-malaysia>> accessed 1 March 2023

603 Joshua Ng, 'Boost to carbon credit trading' (Lestari Gems, 13 October 2023) <[https://www.kenanga.com.my/wp-content/uploads/2023/10/Lestari-Gems-Vol.-12-231013-Kenanga\\_BCX-Handbook-REC-Kuamut.pdf](https://www.kenanga.com.my/wp-content/uploads/2023/10/Lestari-Gems-Vol.-12-231013-Kenanga_BCX-Handbook-REC-Kuamut.pdf)> accessed 1 March 2024

604 Ling Hui and Karen Bong, 'Premier: Sarawak working on Climate Change Policy to mitigate impact on environment, economy and society' (Dayak Daily, 15 March 2023) <<https://dayakdaily.com/premier-sarawak-working-on-climate-change-policy-to-mitigate-impact-on-environment-economy-society/>> accessed 1 March 2024

605 Dhana Raj Markandu, 'Malaysia's cabinet revamp sees 'climate change' name dropped in portfolio split; DPM to helm new energy transition ministry' (Institute of Strategic & International Studies Malaysia, 15 December 2023)

Considering longstanding land rights and deforestation challenges, it is critical that this panel operates with autonomy and aligns its advisory functions with human rights standards.

Furthermore, the legislative framework, while setting a precedent for environmental governance, also prompts questions about its comprehensive enforcement and the genuine inclusivity of all stakeholders in the decision-making process and its alignment with Free, Prior, and Informed Consent (FPIC). The state's efforts in enacting legislation that complies with international CO2 emission reduction standards are laudable. Yet, the effectiveness of these measures in aligning with global climate action and safeguarding human rights is subject to ongoing scrutiny.

In summary, Sarawak's initiatives represent significant steps forward in the fight against climate change from a legislative perspective<sup>606</sup>. However, the real test lies in their implementation and the extent to which they address the intertwined issues of environmental sustainability and human rights protection to ensure that the state's approach to climate emergency not only advances environmental objectives but also upholds and promotes the human rights of its most vulnerable populations.

## 1.6 Hydro Dams - Megadams Are Not Renewable Energy

The Sarawak government's commitment to building three new hydroelectric dams in Sungai Gaat, Sungai Tutoh, and Sungai Belaga<sup>607</sup> has ignited controversy over its energy transition strategy like hydrogen, raising alarms about environmental sustainability and indigenous rights. Critics argue that the cascading dams, touted to minimise flooding, may not be practical or cost-effective, especially during dry seasons. Indigenous communities have vehemently denied giving consent, highlighting a significant breach of the Free, Prior, and Informed Consent (FPIC) principle and pointing out the lack of genuine consultation. This situation indicates the critical balance required between advancing renewable energy initiatives and respecting the rights and territories of indigenous peoples. Previous dam projects have already led to displacement and environmental harm, emphasising the need for an equitable approach to energy development that prioritises sustainability, inclusivity, and the resolution of ongoing social and human rights challenges.

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<<https://www.isis.org.my/2023/12/15/malaysias-cabinet-revamp-sees-climate-change-name-dropped-in-portfolio-split-dpm-to-helm-new-energy-transition-ministry/>> accessed 1 March 2024

606 Karen Bong, 'Landmark Environment Bill 2023 to set S'wak's clean energy regulations, carbon credits, levy ahead of other states' (Dayak Daily, 20 November 2023) <<https://dayakdaily.com/landmark-environment-bill-2023-to-set-swaks-clean-energy-regulations-carbon-credits-levy-ahead-of-other-states/>> accessed 1 March 2024

607 Stephen Then, 'We never consented: Indigenous folks shocked at Abang Jo's announcement on 3 dam projects' (The Vibes, 17 January 2024) <<https://www.thevibes.com/articles/news/100701/we-never-consented-indigenous-folks-shocked-at-abang-jos-announcement-on-3-dam-projects>> accessed 1 March 2024

The Malaysian government's commitment to halt the future construction of large-scale hydroelectric dams contrasts with the continuation of the Nenggiri Dam project, already approved and beyond the jurisdiction of the Minister of Natural Resources, Environment and Climate Change, Nik Nazmi Nik Ahmad, to cancel. This decision faces criticism for disregarding the Free, Prior, and Informed Consent (FPIC) of the Orang Asli, despite the project's proponents, Tenaga Nasional Berhad (TNB), asserting its alignment with the United Nations Sustainable Development Goals (UNSDGs) and climate targets. The stance taken by the minister is seen as incompatible with Malaysia's obligations to protect the rights of the Orang Asli, as the project proceeds despite significant opposition from the community, highlighting a gap between energy transition ambitions and the principle of justice<sup>608</sup>.

### **Green Is Not Necessarily Just!**

A report on Orang Asli youth perception on climate governance in Malaysia<sup>609</sup> highlights a complex issue surrounding the concept of being responsible with energy and development justice, especially when it involves large infrastructure projects like mega-dams. Responsible energy encompasses several dimensions, including environmental stewardship, equitable access to energy resources, and honest, transparent engagement with affected communities. Key findings are as below:

- ***Environmental Stewardship***: This involves constructing and operating energy projects in a way that minimises harm to the environment. It includes considerations like protecting local ecosystems, preserving water quality, and ensuring that the project's carbon footprint is as low as possible.
- ***Equitable Access to Energy***: Projects like dams often promise to bring development and energy access to regions. However, equitable access means that the benefits of such projects, including electricity supply, should be fairly distributed, especially to those directly affected by the construction. It is crucial that local communities receive priority in benefiting from the energy produced, reflecting a fair compensation for the land and resources used.
- ***Transparent and Honest Engagement***: This includes involving communities in decision-making processes from the outset, providing clear and truthful information about the impacts and benefits of the project, and addressing grievances promptly and effectively. Rosmilah's experience suggests a lack of transparent engagement, where the community feels misled about the project's impacts and benefits.

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608 Ili Aqilah, 'Struggle against Nenggiri dam continues for Orang Asli' (Malaysiakini, 14 February 2024)

<<https://www.malaysiakini.com/news/696118>> accessed 1 March 2024

609 Kasih Leia Ixora Azhar, 'Heartbeat voices from Indigenous youth of Peninsula Malaysia' (Klima Action Malaysia, 2023)

<<https://www.klimaaactionmalaysia.org/sekolahiklim>> accessed 1 March 2024

This case above exemplifies the global challenge of ensuring that energy transitions do not perpetuate injustices but instead align with the principles of environmental conservation and respect for Indigenous rights<sup>610,611</sup>.

## 1.7 CCS and CCUS Technology and Fossil Gas

The conclusions from COP28 have inadvertently opened up opportunities for oil, gas, and fossil fuel sectors by introducing certain exceptions. The agreement notably favours "transitional fuels," a term often linked with natural gas, known for its high carbon emissions in power generation. Additionally, it overlooks the challenges associated with carbon capture and storage (CCS) technology, although it does recommend its use in hard-to-abate sectors. Importantly, the effectiveness of CCS in combating climate change is questioned, with projections, like those from the International Energy Agency's net-zero scenario, indicating CCS would only account for a fraction (1 out of 15 gigatons)<sup>612</sup> of the necessary carbon emission reductions in the energy sector by 2030. The emphasis on natural gas and CCS technologies must not be used as excuses to slow the clean energy transition.

ASEAN energy ministers said the region will "continue to use coal-based power because of its affordability and to ensure energy security"<sup>613</sup> by advocating clean coal technology and Carbon Capture, Utilisation and Storage (CCUS). Initiatives include the development of an ASEAN CCUS Deployment Framework and Roadmap, a study on the deployment of CCUS in industrial hubs, and an integrated CCUS-coal power plant pilot project by the ASEAN Centre of Excellence for Clean Coal Technology.

In Malaysia, the NETR identifies CCUS as the 6th Energy Transition lever. Under this roadmap, Malaysia plans to develop three carbon capture, use, and storage (CCUS) hubs—two in Peninsular Malaysia and one in Sarawak. The Ministry of Economy is touted to be leading with a national policy on CCSU.

Experts say CCUS helps decarbonize hard-to-abate industries (e.g., cement, chemicals, steel) and enables countries to comply with international commitments while minimising social and economic disruption. Countries aiming for carbon neutrality by 2050 or 2060 are taking a hard look at CCUS

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610 Stephen Then, 'Sarawak govt confirms construction of three more hydroelectric dams' (The Vibes, 16 January 2024)

<<https://www.thevibes.com/index.php/articles/news/100693/sarawak-govt-confirms-construction-of-three-more-hydroelectric-dams>> accessed 1 March 2024

611 Danielle Keeton-Olsen, 'Sarawak government's hydropower plans worry Indigenous communities' (Mongabay, 2 February 2024)

<<https://news.mongabay.com/2024/02/sarawak-governments-hydropower-plans-worry-indigenous-communities/>> accessed 1 March 2024

612 International Energy Agency, 'Net zero roadmap: A global pathway to keep the 1.5-degree goal in reach'

<[https://iea.blob.core.windows.net/assets/13dab083-08c3-4dfd-a887-](https://iea.blob.core.windows.net/assets/13dab083-08c3-4dfd-a887-42a3ebe533bc/NetZeroRoadmap_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf)

[42a3ebe533bc/NetZeroRoadmap\\_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf](https://iea.blob.core.windows.net/assets/13dab083-08c3-4dfd-a887-42a3ebe533bc/NetZeroRoadmap_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf)> accessed 1 March 2024

613 'Indonesia, Malaysia seek to become regional carbon storage hubs' (Southeast Asia Development Solutions, 20 December 2023)

<<https://seads.adb.org/solutions/indonesia-malaysia-seek-become-regional-carbon-storage-hubs>> accessed 1 March 2024

solutions to decarbonize remaining coal and natural gas operations. The number of local players in the CCSU segment remains few still, even though new tax incentives were introduced in Budget 2023<sup>614</sup> to include Investment Tax Allowance (ITA) of 100% of qualifying capital expenditure for a period of 10 years, full import duty and sales tax exemption on equipment used for CCS technology, and other tax deductions.

SUARAM's 2022 Malaysia Human Rights Report has mythbusted fossil gas as a clean energy and highlighted the Kasawari CCUS initiative, a pioneering effort by Petronas to establish one of the leading offshore carbon capture and storage projects worldwide, with plans to commence CO<sub>2</sub> sequestration by late 2025 or early 2026. Rystad's analysis<sup>615</sup> indicates the project's expenses might hit US\$260 million (RM1.21 billion) by 2025, with a notable concentration of CCS potential sites, 11 out of 16, identified Sarawak's offshore fields, signalling a targeted approach towards CCSU expansion in the area.

Petronas<sup>616,617</sup> has signed a memorandum of understanding (MoU) with six South Korean firms to explore the creation of a comprehensive CCUS and transportation value chain. Simultaneously, an agreement with the Japanese government will initiate CO<sub>2</sub> transport from Japan to Malaysia for storage by 2028. Additionally, Petronas and the TNB have agreed to assess the application of CCS technology in gas-fired power plants through another MoU.

Some critics have voiced concerns over CCS technology, arguing it serves as a pretext for the fossil fuel industry to secure public subsidies and carbon credits, which in turn could finance further fossil fuel extraction and create lucrative opportunities in carbon capture and carbon market dealings. A report by Climate Analytics warns that relying on CCS as a strategy for fossil fuel reduction could inadvertently lead to the emission of an additional 86 billion tonnes of carbon dioxide by the year 2050, dubbing it a potential 'carbon bomb'.

### *Legal and Regulatory Challenges*

Effective CCUS regulation encompasses the entire process from capture, transport, use to storage, necessitating frameworks that define the roles and responsibilities of all stakeholders, including authorities, operators, and the public. The OECD emphasises the need for these frameworks to offer clarity and

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614 Budget 2023 can be accessed here: <https://www2.deloitte.com/content/dam/Deloitte/my/Documents/tax/my-tax-esspresso-highlights-of-budget-22mar2023.pdf>

615 Surin Murugiah, 'Petronas could spend US\$260 mil by 2025 to build carbon capture, utilisation and storage facility, says Rystad' (The Edge Malaysia, 22 August 2023) <<https://theedgemaalaysia.com/node/679565>> accessed 1 March 2024

616 'TNB and Petronas forge alliance to explore CCS technology for gas-fired power plants' (Tenaga Nasional Berhad, 5 November 2023) <<https://www.tnb.com.my/announcements/tnb-and-petronas-forge-alliance-to-explore-ccs-technology>> accessed 1 March 2024

617 'Indonesia, Malaysia seek to become regional carbon storage hubs' (Southeast Asia Development Solutions, 20 December 2023) <<https://seads.adb.org/solutions/indonesia-malaysia-seek-become-regional-carbon-storage-hubs>> accessed 1 March 2024

certainty to both project developers and investors, ensuring a clear understanding of rights and obligations within the CCUS value chain<sup>618</sup>.

In addressing Malaysia's readiness for CCUS technology, it is crucial to highlight the lack of a comprehensive legal framework that currently hinders the responsible development and deployment of CCUS technologies. Critics identify significant gaps in Malaysia's approach, including the absence of detailed regulations for carbon dioxide classification, environmental impact assessments for pipeline networks, and mechanisms for public participation and liability in CCUS projects<sup>619</sup>.

Sarawak's CCUS regulatory progress may not fully ensure the safety, security, effective stewardship and permanency of carbon dioxide seabed storage, given complexities in long-term management, liability, and ownership issues like leakage and territorial disputes<sup>620</sup>. Effective CCUS deployment requires robust legal and regulatory frameworks, including federal legislation, which Malaysia currently lacks, to ensure oversight and minimise offshore CCS risks by adhering to the precautionary principle. For example, Malaysia's nascent stage in CCUS expertise, particularly in subsea carbon injection, poses risks without established legal federal oversight.

Malaysia's 0.8% low GHG emission share globally necessitates a cautious approach to CCUS, given its unproven efficacy, potential risks, and the uncertainties surrounding costs. This cautious stance is further justified by the principle of "fair share," suggesting that the risks and financial burdens of CCS may disproportionately outweigh the benefits for a country with Malaysia's emissions profile.

## 1.8 The Hydrogen Economy: A Costly Endeavour and False Solution

The key arguments regarding Malaysia's adoption of green hydrogen, as outlined, focus on the nation's strategy to leverage hydrogen as part of its commitment to achieving net-zero greenhouse gas emissions by 2050, as driven by the Science, Technology and Innovation Ministry's (MOSTI) Hydrogen Economy and Technology Roadmap (HETR). The HETR aims to create 45,000 jobs, projected to boost the GDP by RM49 billion to RM61 billion, and generate RM12.1 billion in revenue from the hydrogen market by 2030, while reducing greenhouse gas emissions by 0.4% to 1.3%<sup>621</sup>. Despite these optimistic projections, challenges

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618 'Legal and regulatory frameworks for CCUS: An IEA CCUS handbook' (OECD, 18 August 2022)

<<https://www.oecd.org/publications/legal-and-regulatory-frameworks-for-ccus-d52c3bda-en.htm>> accessed 1 March 2024

619 A. Bakar Webb, 'Malaysia needs a robust legal framework on carbon capture, storage' (New Straits Times, 1 January 2024)

<<https://www.nst.com.my/opinion/columnists/2024/01/995963/malaysia-needs-robust-legal-framework-carbon-capture-storage>> accessed 1 March 2024

620 Surin Murugiah, 'Petronas could spend US\$260 mil by 2025 to build carbon capture, utilisation and storage facility, says Rystad' (The Edge Malaysia, 22 August 2023) <<https://theedgemaalaysia.com/node/679565>> accessed 1 March 2024

621 Adam Aziz, 'Malaysia to launch hydrogen roadmap this year as it seeks hydrogen investments' (The Edge Malaysia, 28 August 2023) <<https://theedgemaalaysia.com/node/680427>> accessed 1 March 2024

remain, such as the current high cost of hydrogen production, priced at 60 to 80 sen per kWh, with a goal to reduce it to 15 sen per kWh within five years<sup>622</sup>.

A significant portion of global hydrogen production relies on carbon-intensive methods<sup>623</sup> like natural gas reformation and coal gasification, which undermine emission reduction efforts due to methane leakage and the high energy demands of Carbon Capture and Storage (CCS) technologies, also known as blue hydrogen. Scholars and activists argued that the push for hydrogen supports continued reliance on fossil fuel infrastructure, diverting focus from necessary emission reductions and sustainable energy alternatives. Currently, only 1% of global hydrogen is produced using renewable energy, known as green hydrogen. The high production cost of green hydrogen makes it less economically viable compared to crude oil.

Sarawak emerges as a leader in Malaysia's hydrogen initiatives, having launched hydrogen-powered buses and announced plans for commercial-scale green hydrogen production, utilising its substantial hydropower resources<sup>624</sup>. However, the cost of producing hydrogen using green energy remains prohibitively high compared to crude oil prices. Support for hydrogen as a clean energy solution includes stakeholders like Petronas and the Sarawak state government, which sees its hydroelectric capacity as an asset for green hydrogen production. Yet, criticisms persist regarding the environmental and social impacts of sourcing green hydrogen from hydropower, challenging the sustainability considering the high social cost, land use change and carbon footprint of such projects<sup>625</sup>, calling it a false solution.

## 2.0 A Heavy Focus on Mitigation: Balance of Priority

Despite ambitious climate commitments and pledges, some significant challenge remains: the slow pace at which Malaysia is developing a national adaptation plan and climate regulation framework. Efforts to review and update the National Climate Change Policy 2009 into a newer version have been made, yet detailed public information remains scarce. While the country has introduced various policy instruments such as roadmaps and financial mechanisms to transition towards a low-carbon economy, progress on the adaptation front lags behind.

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622 'Cheaper green hydrogen energy in the pipeline' (MIDA, 2 November 2023) < <https://www.mida.gov.my/mida-news/cheaper-green-hydrogen-energy-in-the-pipeline/> > accessed 1 March 2024

623 International Renewable Energy Agency, 'Hydrogen' < <https://www.irena.org/Energy-Transition/Technology/Hydrogen#:~:text=As%20at%20the%20end%20of,around%204%25%20comes%20from%20electrolysis.> >

accessed 1 March 2024

624 Stephen Then, 'Sarawak eyes more rivers for cascading hydroelectric dams' (The Vibes, 16 November 2023)

< <https://www.thevibes.com/articles/news/99976/sarawak-govt-eyes-more-rivers-for-construction-of-cascading-hydroelectric-dams> > accessed 1 March 2024

625 'COP27: Groups warn of severe climate and human rights risk of new hydropower dams and schemes' (Waterkeeper Alliance, 15 November 2022) < <https://waterkeeper.org/news/cop27-groups-warn-of-severe-climate-and-human-rights-risk-of-new-hydropower-dams-and-schemes/> > accessed 1 March 2024

The postponement of the Climate Change Bill to 2025 is a pressing concern, given the urgent need for such legislation. This delay in implementing a system for legal accountability in climate actions in the rapidly evolving mitigation strategies, including inactions and delays such as seen in the adaptation framework, signifies a shortfall in the government's duty to safeguard its citizens against the deadly impacts of climate crisis. The absence of a robust legal framework for climate governance points to a pressing need for a strategic shift in policy prioritisation. Recently it was revealed that Deloitte has been enlisted to facilitate stakeholder consultations, among other roles, in crafting Malaysia's climate change bill.

The establishment of a national climate change consultative panel, inclusive of civil society, marks a new avenue and potential for participatory governance. However, calls for greater transparency in the operations and discussions of this group have emerged. Notably, women's groups and many other vulnerable communities have been excluded from this panel, raising concerns about the sidelining of gender perspectives and representation. Civil society organisations continue to advocate for a stronger emphasis on environmental rights, urging constitutional amendments to better reflect these concerns.

### **3.0. Corporate Accountability and Due Diligence**

*From the SUARAM Human Rights Report 2023 Overview*

In Malaysia's response to ESG, disclosure and accountability, the Joint Committee on Climate Change (JC3) was set up to guide businesses towards climate resilience through guidelines and regulations. Moreover, to boost the manufacturing sector's ESG practices, the i-ESG framework has been introduced. Simultaneously, Malaysia's National Action Plan on Business and Human Rights, currently in the making, promotes corporate accountability with the environment as its cornerstone. The Bursa Carbon Exchange has started trading. However, there's a demand for more mandatory safeguards in Malaysia's Voluntary Carbon Market (VCM), especially in light of a judicial review filed by civil society against the Sabah state government for perceived due diligence shortcomings in the Sabah NCA Deal. Despite the cabinet's approval for the development of the Freedom to Information Act and Government Procurement Act, several enduring institutional barriers continue to hinder transparency in government operations. These include the inadequacies of the Whistleblower Protection Act 2010, the absence of an anti-SLAPP legal framework to safeguard the safety of activists<sup>626</sup>, and the persistent application of the Official Secrets Act 1972. Furthermore, the issue of defining greenwashing, particularly in the context of Net Zero commitments, remains a subject of debate with no clear legal repercussions established.

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626 'Malaysia: Timber company Samling files defamation suit against Indigenous civil society group, rights organisations claim it's a SLAPP; co. responds' (Business & Human Rights Resource Centre, 4 October 2021) <<https://www.business-humanrights.org/en/latest-news/malaysia-timber-company-samling-files-defamation-suit-against-indigenous-civil-society-group-rights-organisations-claim-its-a-slapp-co-responds/>> accessed 1 March 2024

#### 4.0. Malaysia COP28 Brief Update

Malaysia sent its largest delegation of 700 delegates<sup>627</sup> to UNFCCC-COP28, “representing government ministries and agencies, private sector, and nongovernmental organisations (NGOs)”, with around 35 negotiators focusing on 8 key areas like Global Stocktake (GST)<sup>628</sup>, Market & Non-Market Mechanism under Article 6, Just Transition/Response Measure, Climate Finance including Loss & Damage Fund, Mitigation Work Program (MWP), Adaptation including Loss & Damage, Agriculture, and Transparency.

Malaysia has made several key pledges during COP28<sup>629</sup>. Some specific commitments include signing the Oil and Gas Decarbonization Charter, participating in the Coal Transition Accelerator, and involvement in the Podong Indigenous Peoples Initiative. Other notable pledges involve joining the Global Methane Pledge, reducing deforestation rates, and increasing renewable energy usage. Furthermore, Malaysia has committed to the Emirates Declaration on Resilient Food Systems, Sustainable Agriculture and Climate Action, the COP28 Declaration on Climate and Health, the COP28 Declaration of Intent on Mutual Recognition of Certification Schemes for Renewable and Low-Carbon Hydrogen and Derivatives, the COP28 Global Renewables and Energy Efficiency Pledge, and the Joint Statements on United for our Forests and the Group of Friends of Children and the Sustainable Development Goals.

The Malaysian Pavilion at UNFCCC COP28 was a collaborative effort managed by NRECC, Malaysia Green Technology and Climate Change Corporation (MGTC), with Boston Consulting Group (BCG) potentially hired for support. A document<sup>630</sup> made public shared insights on Malaysia’s involvement in COP28, mainly highlighting activities within the Malaysian Pavilion, social media interaction and media interviews. However, it provided limited insight into Malaysia’s position and progress in the eight focus areas in the negotiations previously mentioned. Notably, there was an absence of a cost-benefit analysis for the Malaysia Pavilion, despite its significant visibility and focus, raising questions regarding the financial logistics and investment behind the Malaysian Pavilion’s presence.

#### 5.0. Gender and Women’s Rights Remains a Backseat

In an unpublished report of the 4th National Climate Communication NC4, the gender section is a new addition, promising to advance a comprehensive gender-responsive

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627 Ministry of Natural Resources and Environmental Sustainability, ‘Malaysia’s participation in UNFCCC-COP28’ <  
<https://www.malaysiapavilion-cop.com/static/documents/malaysias-participation-in-cop28-report-v18-fa-web.pdf>> accessed 1 March 2024

628 Note: The Global Stocktake is a process established under Article 14 of the Paris Agreement to assess collective progress towards achieving the purpose of the Agreement and its long-term goals. While the Agreement has spurred global action on climate change and reduced future warming forecasts, there is a glaring gap in emissions reductions, with current national commitments falling short by 20.3 to 23.9 gigatonnes of CO2 equivalent compared to the levels required to limit warming to 1.5 °C by 2030

629 Malaysia’s COP28 pledges can be found here: <https://www.cop28.com/en>

630 Ministry of Natural Resources and Environmental Sustainability, ‘Malaysia’s participation in UNFCCC-COP28’ <  
<https://www.malaysiapavilion-cop.com/static/documents/malaysias-participation-in-cop28-report-v18-fa-web.pdf>> accessed 1 March 2024

approach to climate change in alignment with the Lima Work Programme on Gender. The gender-responsive approach to climate change identified four key areas. It prioritises enhancing gender integration into climate policies through capacity building and knowledge management, promoting gender balance and women's leadership in the climate action process, and advocating for gender-responsive policy implementation. This approach includes initiatives like appointing UNFCCC gender focal points, fostering women's participation in the UNFCCC process, and emphasising gender budgeting and the use of sex-disaggregated data. The strategy also focuses on monitoring and reporting the effectiveness of these gender-responsive actions. Overall, it aims to ensure gender considerations are central to climate change strategies, enhancing inclusivity and effectiveness in addressing climate impacts.

### *Implementation Gap*

At COP28, Malaysia's approach to incorporating gender into climate discussions was notably absent, lacking both a designated gender focal point and national delegation participation in gendered discussions on Just Transition, a key agenda led by the International Labour Organization (ILO). This absence was felt despite the country's vocal support for Just Transition in the media, highlighting a missed opportunity for prioritising gender considerations in climate action discussions.

Furthermore, national consultations on climate change raised concerns about the exclusion of women's groups from significant panels, with minimal subsequent action from the National Resources and Environment Secretariat (NRES), the designated climate change focal point. The Ministry of Women, Family and Community Development organised discussions on women and climate change but faced challenges in follow-up due to a lack of data, financial resources, and technical capacity for gender analysis of climate impacts and solutions within Malaysia. This situation contrasts with regional counterparts like the Philippines and Indonesia, where gender action plans have become a priority through the development of policies and action plans, including gender-responsive budgeting initiatives like Indonesia's gender climate budget tagging.

The UNFCCC's Enhanced Lima Work Programme on gender and its Gender Action Plan highlight the critical role of gender-responsive climate finance in empowering women and promoting gender equality in climate action. Despite the absence of gender-specific quantitative targets in climate finance, the programme encourages the integration of gender perspectives into climate finance initiatives. Key opportunities for advancing gender equality in climate finance discussions include the negotiations on the New Collective Quantified Goal (NCQG)<sup>631</sup> to be finalised by COP29 and the 2024 Forum of the Standing Committee on Finance<sup>632</sup> themed "Accelerating climate action and resilience through gender-responsive finance".

These initiatives reflect a global commitment, recognized by developed countries through international agreements like the Beijing Declaration and Sustainable Development Goal

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631 More information about NCQG can be found here: <https://unfccc.int/NCQG>

632 More information about the Forum of the Standing Committee on Finance can be found here:

[https://unfccc.int/sites/default/files/resource/BgP\\_SCF32\\_Theme%20for%20the%20next%20Forum.pdf](https://unfccc.int/sites/default/files/resource/BgP_SCF32_Theme%20for%20the%20next%20Forum.pdf)

5, to gender-responsive finance. However, translating these commitments into tangible support for gender equality in climate action requires further effort.

For Malaysia, supporting the gender agenda in climate action and finance at COP meetings is not merely a women's rights obligation<sup>633</sup> but a practical necessity. Gender-responsive climate finance can enhance the effectiveness of climate action by acknowledging the distinct impacts of climate change on different genders and leveraging the unique contributions of women to climate resilience and sustainability. This approach can lead Malaysia and other nations toward more inclusive and equitable climate action efforts.

## 6.0. Missing the Forest for Carbon: Sabah NCA Carbon Deal

SUARAM's 2022 Malaysia Human Rights Report documented that Sabah had entered into a "secretive" nature conservation agreement with Hoch Standard to sell carbon credits and other natural capital from a vast forest area spanning two million hectares for a century. This disclosure caught civil society and Indigenous groups in Sabah off guard, sparking concerns over the lack of transparency surrounding the agreement. The deal faced significant backlash for its secrecy, particularly as it involved "shell" companies. Sabah's Attorney-General, Datuk nor Asiah Mohd Yusof, criticised the agreement, highlighting its failure to address key parameters and its questionable legal enforceability. Former Malaysian senator and indigenous leader Adrian Lasimbang initiated a legal challenge against the agreement in December 2021.

Fast forward to 2023, Datuk Seri Dr. Jeffrey Kitingan<sup>634</sup> highlighted that despite objections raised by the state Attorney General (AG) regarding due diligence requirements, the agreement remained active. The unresolved concerns from the AG were not formally brought to the state cabinet or the steering committee responsible for overseeing the agreement's implementation. The AG's statement is perceived as an independent and unauthorised action<sup>635</sup>. The Carbon Sovereign Sabah Coalition has since filed a judicial review<sup>636</sup> to address these issues. A legal advisor to the state government highlighted that the NCA's terms fail to align with the requirements of the Sabah Biodiversity Enactment 2000, which mandates approval from the Director of the Biodiversity Institute and the Biodiversity Council for any exploitation of biological resources in Sabah. Additionally, one of the key issues raised was the absence of an approved "benefit sharing agreement"

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633 United Nations Human Rights Office of the High Commissioner, 'General recommendation No.37 (2018) on gender-related dimensions of disaster risk reduction in a changing climate' <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no37-2018-gender-related> > accessed 1 March 2024

634 Anthea Peter, 'Carbon trading deal is still on: Jeffrey' (Daily Express, 28 July 2023) <<https://www.dailyexpress.com.my/news/217042/carbon-trading-deal-is-still-on-jeffrey/> > accessed 1 March 2024

635 Jenne Lajjun, 'Various parties delay Nature Conservation Agreement' (The Borneo Post, 27 February 2024) <<https://www.theborneopost.com/2024/02/27/various-parties-delay-nature-conservation-agreement/>> accessed 1 March 2024

636 Ersie Anjumin, 'Sabah's civil society groups to initiate judicial review on controversial carbon deal' (New Straits Times, 2 August 2023) <<https://www.nst.com.my/news/nation/2023/08/937858/sabahs-civil-society-groups-initiate-judicial-review-controversial-carbon>> accessed 1 March 2024

with local native communities regarding the funds generated from natural resources<sup>637</sup>, highlighting social inequality and poor transparency. The ambiguity surrounding the designated area in the Nature Conservation Agreement (NCA), covering up to two million hectares, prompts concern. With Sabah's extensive forest area of 4,679,594 hectares, a considerable part being in Protected Areas, including Totally Protected Areas (TPAs)<sup>638</sup>, the inclusion of TPAs under the NCA could contravene the Forest Enactment of 1968. Furthermore, TPAs do not align with the Paris Agreement's standards for carbon credit initiatives, which target areas threatened by deforestation that require carbon credit sales for protection. Given TPAs face no deforestation threat and don't need carbon financing for their preservation ("additionalty")<sup>639</sup>, they fall outside the scope of eligible locations for generating carbon credits and mitigation outcomes.

## 7.0 David vs Goliath: SAVE Rivers Stands Tall

The 2022 report by SUARAM shed light on a significant legal battle involving Samling, a timber corporation, and SAVE Rivers, an NGO. Samling filed a defamation lawsuit seeking 5 million ringgit (around US\$1.07 million) from SAVE Rivers for publishing seven articles from June 2020 to March 2021. These publications, part of the #StopTheChop campaign, criticised Samling for allegedly failing to consult with Penan communities near its logging operations in Sarawak's Gerenai and Ravenscourt Forest management units (FMUs). SIRIM, a Malaysian certification authority, conducted independent audits in 2019, 2021 and 2022 that supported the NGO's claims.

This lawsuit was identified by international observers, including the UN Special Rapporteur on the Rights of Indigenous Peoples and the Business and Human Rights Resource Centre, as a SLAPP (Strategic Lawsuit Against Public Participation), typically used to intimidate, bankrupt, and silence environmental activists and defenders through costly legal processes.

However, a peaceful resolution was reached<sup>640</sup>. Both parties agreed to an amicable settlement that allowed Samling to proceed with its activities in the Gerenai concession, conditional upon proper consultation with the impacted communities. Additionally, SAVE Rivers maintained the right to keep its articles online, marking a significant moment for corporate accountability and the advocacy for indigenous rights through constructive dialogue and negotiation.

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637 Julia Chan, 'Sabah legal adviser: Problematic carbon credit project should be heavily reconsidered, amended' (Malay Mail, 28 February 2024) <<https://www.malaymail.com/news/malaysia/2024/02/28/sabah-legal-adviser-problematic-carbon-credit-project-should-be-heavily-reconsidered-amended/120488>> accessed 1 March 2024

638 '30 pct of Sabah landmass to be totally protected by 2025, says Hajiji' (The Borneo Post, 9 November 2021) <<https://www.theborneopost.com/2021/11/09/30-of-sabah-landmass-to-be-totally-protected-by-2025/>> accessed 1 March 2024

639 The tool for the demonstration and assessment of additionalty can be found here:

<https://unfccc.int/sites/default/files/resource/SB002-call-for-input-5.1-Add%20Tool.pdf>

640 'Timber giant Samling Plywood withdraws suit against SAVE Rivers' (Free Malaysia Today, 19 September 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/09/19/timber-giant-samling-plywood-withdraws-suit-against-save-rivers/>> accessed 1 March 2024

## 8.0. Policy Recommendations

1. Recognise environmental rights in Malaysia's Federal Constitution.
2. Urgently enact a National Climate Change Act that is rights based - Procedural, Substantive, Protection of vulnerable groups and environmental human rights defenders, and institutionalise access to remedy.
3. A re-evaluation and substantive political action to alleviate challenges on state and federal relationships on the protection of land and natural resources, and the people relying on these sources. For example, a significant challenge is the ability to achieve mitigation outcomes related to land use, land-use change, and forestry (LULUCF) within the Nationally Determined Contributions (NDCs).
4. Have a balance of priority towards a National Adaptation Plan.
5. Urgently implement a Climate Budget Tagging framework to map financial accountability on climate adaptation and mitigation.
6. Enhance legal, technical, and regulatory infrastructure to ensure safe, secure, and effective implementation of CCUS technologies, aligning with environmental protection and public safety standards.
7. Strengthen EIA process and its independence to uphold integrity.
8. Demonstrate political will to pursue Just Transition, aligned to international labour standards and current international obligations that addresses systemic inequalities. Emphasising quality jobs, maintaining international labour standards, focusing on occupational workers health and safety, as well as recognising the care economy and social protection of the most vulnerable, ensuring sufficient funding, and advocating for transparent and accountable governance<sup>641</sup> are key pillars to achieving a just and inclusive transition<sup>642</sup>.
9. Strengthen corporate accountability through the National Action Plan on Business and Human Rights (BHR) in alignment to the UN Guiding Principle especially on supply chain sustainability and human rights and environment due diligence (HREDD) framework.
10. Finance and improve data collection, research, and data accessibility on women, climate change, and just transition, including developing gender-sensitive indicators and collecting gender, indigeneity, age, and disability-related disaggregated and recognised community-level data.
11. Conduct meaningful social dialogue and responsive engagement with the rakyat democratically, ensuring that these practices are institutionalised within policymaking at all levels. Adequate, informed, and ongoing consultation should take place with all relevant stakeholders, especially on policy design and implementation and reducing the risk of false solutions and maladaptation.
12. Integrate gender into climate action policies. Appointing UNFCCC National Gender & Climate Change Focal Points would be a critical move to ensure gender

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641 'Just energy transitions as a development priority for Africa' (UNDP, 1 November 2023) <

<https://www.undp.org/africa/ticad/stories/just-energy-transitions-development-priority-africa> > accessed 1 March 2024

642 International Renewable Energy Agency, 'Finding common ground for a just energy transition: Labour and employer perspectives'

<<https://www.irena.org/Publications/2023/Aug/Finding-common-ground-for-a-just-energy-transition-Labour-and-employer-perspectives>> accessed 1 March 2024

perspectives are fully incorporated in climate change discussions and actions. Furthermore, adopting a climate gender-responsive budgeting framework, like utilising the OECD Gender Marker for climate finance, would help in systematically incorporating gender into climate finance. This approach would ensure that climate investments support gender equality and women's empowerment, addressing the different ways in which climate change impacts men and women.

13. Reintroduce local government elections, which could improve public administration and accountability especially at the local level where services directly impact citizens. Elected officials, responsive and accountable to the voters' needs and priorities can foster better governance and lower corruption levels, making them more inclined to adopt policies tackling local environmental and climate issues effectively. This democratic approach enhances grassroots and community involvement in climate resilience, promoting greater ownership and commitment to sustainability efforts. Consequently, this leads to more localised and impactful climate solutions.



SPECIAL  
FEATURE 1

REGRESSIVE  
CITIZENSHIP  
AMENDMENT



The Malaysian government announced proposed constitutional revisions to grant automatic citizenship to children born abroad to Malaysian mothers. Yet, despite this positive step, several other amendments were introduced with five being identified as regressive. Entities like the National Human Rights Commission of Malaysia (SUHAKAM), the Bar Council, experts, activists, scholars, and affected individuals voiced resistance. Despite this, the cabinet proceeded to present the amendments to the Conference of Rulers in November 2023<sup>644</sup>.



*To date, the Government of Malaysia has not granted the legal right to work to stateless persons with strong links to Malaysia. This leaves them with few avenues for upward mobility, creating a multigenerational vicious cycle of poverty.*

In the passage from 2011 to 2016, we witnessed the nuanced intricacies of pre-independence statelessness among Minority Indians in Malaysia. Through meticulous mapping and registration exercises, baseline data were gathered, shedding light on the plight of elderly stateless individuals and delineating the varied categories of statelessness<sup>645</sup> prevalent in the nation.

Building upon this groundwork, the years 2017 to 2018 saw the emergence of a concerted effort in the form of the National Registration Campaign. Spearheaded by the Malaysian

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644 'The Malaysian Bar Urges the Government to Re-evaluate and Halt Recent Proposed Amendments to Citizenship Laws Deemed Regressive' (Malaysian Bar, 11 December 2023) <<https://www.malaysianbar.org.my/article/about-us/president-s-corner/presstatements/press-release-the-malaysian-bar-urges-the-government-to-re-evaluate-and-halt-recent-proposed-amendments-to-citizenship-laws-deemed-regressive>> accessed 25 February 2024

645 Jamie Chai Yun Liew, 'Homegrown statelessness in Malaysia and the promise of the principle of genuine and effective links' (Statelessness & Citizenship Review) <<https://statelessnessandcitizenshipreview.com/index.php/journal/article/download/13/11>> accessed 25 February 2024

government, MegaMyDaftar<sup>646</sup> aimed to confront the enduring issue of statelessness head-on by streamlining birth registrations and issuing vital identity documents.



*Family Frontiers and six mothers went to court to demand that mothers should have the same rights as fathers to pass on their citizenship to their children. (Photo: FMT<sup>647</sup>)*

By 2019 to 2020, the Pakatan Harapan coalition boldly stepped forward with a resolute commitment to rectify the blight of statelessness, particularly focusing on the elderly stateless population among Indians and other ethnic groups<sup>648</sup>. While their manifesto contained a pledge to resolve statelessness within a mere 100 days<sup>649</sup>, it however did not substantially address the situation completely. On 29 July 2019, the then Home Minister Tan Sri Muhyiddin Yassin pledged to formulate a new standard operating procedure

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646 Development of Human Resources in Rural Areas Malaysia, Voice of the Children, Yayasan Chow Kit, Global Campaign for Equal Nationality Rights, Statelessness Network Asia Pacific and Institute on Statelessness and Inclusion, 'Joint submission to the Human Rights Council at the 31st session of the Universal Periodic Review'

<<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=5755&file=EnglishTranslation>> accessed 25 February 2024

647 'NGO waiting with 'bated breath' for citizenship law to be amended' (Free Malaysia Today, 18 February 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/02/18/ngo-waiting-with-bated-breath-for-citizenship-law-to-be-amended/>> accessed 25 February 2024

648 G Prakash, 'Home minister: Early stage of Pakatan's promise to solve stateless Indians' problem met' (Malay Mail, 6 May 2019)

<<https://www.malaymail.com/news/malaysia/2019/05/06/home-minister-early-stage-of-pakatan-s-promise-to-solve-stateless-indians-pr/1750279>> accessed 25 February 2024

649 Pakatan Harapan's manifesto can be found here: [https://dl.dapmalaysia.org/repository/Manifesto\\_PH\\_EN.pdf](https://dl.dapmalaysia.org/repository/Manifesto_PH_EN.pdf)

(SOP)<sup>650</sup> to address documentation issues and statelessness in Malaysia<sup>651</sup>. The COVID-19 pandemic that followed amplified the situation of vulnerability for Malaysian women who are unable to obtain citizenship for their children born overseas. This challenge prompted strategic litigation<sup>652</sup> and campaigns led by The Malaysian Campaign for Equal Citizenship, aiming to challenge gender discrimination embedded within nationality laws. Despite its brief tenure cut short by political upheaval, the Pakatan Harapan government demonstrated a commitment to tackling unequal citizenship laws through proposed amendments.

Fast forward to 2022, the advent of the coalition government 'Madani' heralded a renewed dedication to bridging gender disparities entrenched within nationality laws. Advocating against childhood statelessness, particularly concerning adopted children and those born before marriage, their efforts serve as a beacon of hope. Their stance resonates with promises made in both the BN and PH Manifestos<sup>653</sup>.

The momentum towards legislative reform continued unabated. With the proposed upcoming tabling of nationality laws tailored to safeguard the rights of Malaysian women and their overseas-born children, the Madani Government however bundled several regressive amendments that were far from the realities on the ground in addressing statelessness.

**Reflecting on a decade-long journey, it has become crucial to understand the specifics of these amendments and the potential ramifications they may bring.**

*February 2023: Announcement of Progressive Citizenship Amendment to Malaysian Mothers Whose Children Are Born Overseas*

In February 2023, the Malaysian government announced its plans to amend the Constitution, aiming to grant equal citizenship rights to Malaysian women. This move includes granting automatic citizenship to children born abroad, aligning with the rights enjoyed by Malaysian men. For years, Malaysia has faced criticism for its citizenship laws

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650 Prof Dr. Mohd Azizuddin Mohd Sani, Assoc. Prof. Dr. Nor Idayu Mahat and Assoc. Prof. Dr. Ummu Atiyah Ahmad Zakuan, 'Report project to study and analyse the compatibility of Malaysian laws with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)' (SUHAKAM) <<https://suhakam.org.my/wp-content/uploads/2021/10/ICERD.pdf>> accessed 25 February 2024

651 Development of Human Resources in Rural Areas Malaysia, Voice of the Children, Yayasan Chow Kit, Global Campaign for Equal Nationality Rights, Statelessness Network Asia Pacific and Institute on Statelessness and Inclusion, 'Joint submission to the Human Rights Council at the 31st session of the Universal Periodic Review' <<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=5755&file=EnglishTranslation>> accessed 25 February 2024

652 R Loheswar, 'Family Frontiers slams Putrajaya's move to appeal High Court's judgment on children citizenship case' (Malay Mail, 17 May 2021) <<https://www.malaymail.com/news/malaysia/2021/05/17/family-frontiers-slams-putrajayas-move-to-appeal-high-courts-judgment-on-ch/1974751>> accessed 25 February 2024

653 'Madani government must abandon regressive citizenship amendments — Malaysian Citizenship Rights Alliance' (Malay Mail, 16 December 2023) <<https://www.malaymail.com/news/what-you-think/2023/12/16/madani-government-must-abandon-regressive-citizenship-amendments-malaysian-citizenship-rights-alliance/107855>> accessed 25 February 2024

that were perceived as unjust and biased against women<sup>654</sup>. Under the existing Federal Constitution, only children born overseas to Malaysian men with foreign spouses were entitled to automatic Malaysian citizenship, leaving out children born abroad to Malaysian women who are married to foreigners. As a result, Malaysian mothers have to go through a cumbersome process of applying for their children's citizenship, often enduring lengthy waits and facing the possibility of unexplained rejections.

### *June 2023: Regressive Citizenship Amendment worsening Childhood Statelessness*

In June 2023, the government announced new constitutional amendments, five of which would worsen statelessness by creating additional categories of stateless individuals. Proposed by the Home Ministry, these amendments pose a significant threat to citizenship rights for vulnerable communities in Malaysia<sup>655</sup>. If enacted, they would weaken current protections and limit legal recourse, worsening the statelessness crisis<sup>656</sup>.

#### 1. Foundlings and abandoned children will no longer be entitled to automatic citizenship.

Proposed amendment: Change the method of acquiring citizenship from "operation of law" to "registration" in Section 19B, Part III of the Second Schedule.

The Federal Constitution currently protects foundlings with automatic citizenship under Section 19B, when the date and place of the child's birth, and the status of the child's parents are unknown and cannot be proven.

**Risks:** Right to citizenship for foundlings and abandoned children would be subjected to ministerial discretion without any oversight from the judicial power. At the same time, this provision is stated in the Malaysia Agreement 1963 under the amendments of citizenship in the Second Schedule<sup>657</sup>. This amendment was put in good faith to protect East Malaysians during the formation of Malaysia and hence, removing this section without proper consultation from Sabah and Sarawak would go against the spirit of the Malaysia Agreement of 1963.

**Current practice:** The landmark Federal Court case *CCH & Anor v Pendaftar Besar Bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 established that abandoned children have the right to citizenship by operation of law, setting crucial guidelines for

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654 Jaclyn L. Neo, 'Malaysia's proposed citizenship amendments: Gender equality moving ahead but other challenges surface' (Constitution Net, 3 October 2023) <<https://constitutionnet.org/news/malysias-proposed-citizenship-amendments-gender-equality-moving-ahead>> accessed 25 February 2024

655 'The constitutional amendment creep: Perpetuating statelessness in Malaysia' (New Naratif, 30 August 2023) <<https://newnaratif.com/the-constitutional-amendment-creep/>> accessed 25 February 2024

656 Fazleena Aziz, "Stateless people still facing documentation problems" (The Star, 8 November 2023) <<https://www.thestar.com.my/news/nation/2023/11/08/stateless-people-still-facing-documentation-problems>> accessed 25 February 2024

657 Malaysian Agreement, Third Schedule, Citizenship (Amendment of Second Schedule to Constitution), 19B, pg 72

government bodies on handling future cases involving abandoned newborns<sup>658</sup>. Following this case, the National Registration Department (NRD) should be issuing automatic citizenship to foundlings without the need for a court order. Unfortunately, this process remains inaccessible as the NRD refuses to acknowledge the foundlings' circumstances and refuses to register the foundlings as citizens. The NRD's actions have resulted in many foundlings remaining stateless as they are not able to access legal remedies due to unaffordable and exorbitant legal fees<sup>659</sup>.

2. Children born to Malaysian permanent residents would no longer have access to automatic citizenship.

Proposed amendment: deletion of the words "permanently resident" in Section 1(a), Article 14(1)(b) Second Schedule Part II

The Federal Constitution currently enables children born to Malaysian permanent residents to access citizenship, when the child is born in Malaysia.

**Risks:** Children born to permanent residents (PRs) with stateless status would no longer have access to citizenship by 'operation of law', thus passing on statelessness to a second generation and creating a new class of statelessness<sup>660</sup>. For example, the Lundayeh ethnic group living in the rural parts of Sabah are at risk of being stateless. The community has been issued permanent resident cards even though they have been living in the state since the formation of Malaysia<sup>661</sup>. Hence, if this were to be removed, it would render descendants of indigenous families stateless.

**Current Practice:** Children born to stateless permanent residents do not acquire statelessness from their parent(s) since they are eligible for Malaysian citizenship through 'operation of law', thus averting intergenerational statelessness.

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658 Tan K, 'Case Commentary: CCH and Anor V Pendaftar Besar Bagi Kelahiran Dan Kematian, Malaysia' [2021] SSRN Electronic Journal

659 Advocates for Non-Discrimination and Access to Knowledge (ANAK), Association of Family Support & Welfare Selangor & KL (Family Frontiers), Borneo Komrad, Buku Jalanan Chow Kit, Yayasan Chow Kit, Development of Human Resources in Rural Areas (DHRRA) Malaysia, Elom Initiatives, Global Campaign for Equal Nationality Rights, Institute on Statelessness and Inclusion, Lawyers for Liberty, and Nationality for All (NFA), 'Joint submission to the Human Rights Council: Universal Periodic Review (45th session, fourth cycle, January-February 2024)' < [https://files.institutesi.org/UPR45\\_Malaysia.pdf](https://files.institutesi.org/UPR45_Malaysia.pdf) > accessed 25 February 2024

660 Nabila Shila, 'How statelessness affects 'born and bred' Malaysians' (Malaysiakini, 16 April 2023) <<https://www.malaysiakini.com/news/662344>> accessed 25 February 2024

661 David Thien, 'Sabahan native but not yet Malaysian' (Daily Express, 23 December 2023) <[https://www.dailyexpress.com.my/news/225846/sabahan-native-but-not-yet-malaysian/?utm\\_source=Newswav&utm\\_medium=Website](https://www.dailyexpress.com.my/news/225846/sabahan-native-but-not-yet-malaysian/?utm_source=Newswav&utm_medium=Website)> accessed 25 February 2024

3. Vulnerable stateless persons would no longer be constitutionally protected against statelessness.

Proposed amendment: amend from citizenship by 'operation of law' to citizenship by 'registration to Section 1(e), Article 14(1) (b), Second Schedule Part II and to repeal Section 2(3)<sup>662</sup>

**Risks:** Citizenship for Malaysia-born stateless children such as children born out of wedlock, adopted stateless children, abandoned stateless children and indigenous communities in Malaysia would become a non-automatic, application-based, and discretionary process. This change would also expose them to the risk of lacking judicial avenues to pursue citizenship. The removal of the Stateless Safeguard would be problematic as Sabahan lawyers have relied on this section to fight for access to citizenship for children born to Sabahans involving children born out of wedlock, foundlings, and indigenous people (*Bumiputera*) in Sabah.

Here is a real-life case study that involves an Indigenous Malaysian couple residing in a rural village. Although they had a baby girl, their marriage was not legally registered at her birth. When the child was three years old, her mother disappeared, leaving her father to care for her. At the age of 15, her father took the initiative to register her birth belatedly and obtain an ID card. The government issued a late birth certificate, confirming her Malaysian citizenship. However, after her father's passing, her sister sought clarification regarding her ID status. Subsequently, a re-evaluation led to the creation of another birth certificate, stating that she was not a citizen. As of now, her ID status remains undecided. Moreover, several factors contributed to the couple's failure to register their marriage, including their remote location far from any NRD office, limited resources for travel, and a lack of awareness regarding the significance of marriage registration.

**Current practice:** The High Court had on 21 October 2019 declared that Wong is a Malaysian citizen based on the Second Schedule, Part II under Section 1(e) of the Federal Constitution – a provision under which those born within Malaysia and are not born to a citizen of any other country are entitled to Malaysian citizenship by operation of law.

4. Citizenship of the foreign spouse will be revoked if the marriage to the Malaysian man is dissolved less than 2 years after the spouse acquires Malaysian citizenship.

Proposed amendment: To replace the word “date of the marriage” with “date of obtaining citizenship Article 26(2) in the Federal Constitution

**Risk:** Places foreign wives at risk of statelessness with citizenship deprivation, which may have the effect of trapping a previously foreign wife in a potentially violent marriage.

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662 Ida Lim, “Invisible’ in Malaysia: Why are people born here stateless and will the gov’t citizenship proposals fix or worsen the problem?’ (Malay Mail, 30 June 2023) <<https://www.malaymail.com/news/malaysia/2023/06/30/invisible-in-malaysia-why-are-people-born-here-stateless-and-will-the-govts-citizenship-proposals-fix-or-worsen-the-problem/76895>> accessed 25 February 2024

**Current Practice:** The proposed amendment aims to address 'marriages of convenience'. Currently, for a non-citizen wife to be eligible for citizenship, she must follow a series of steps: having resided in Malaysia for five years to qualify for permanent resident (PR) status, waited for approval of PR status which typically took between two to five years, continued to reside in Malaysia on PR status for an additional two years, and finally applied for citizenship<sup>663</sup>.

5. Stateless child applicants will have reduced years to apply for citizenship.

Proposed amendment: Amend and reduce the age limit from "21 years" to "18 years" for the purpose of obtaining citizenship to Article 15(2), 15A, 19(1), 23(1), and 23(3)

**Risk:** The amendment would have the effect of shortening the time available for process and appeals, shutting the path to citizenship.

**Current Practice:** At present, the citizenship application processing period is fraught by bureaucratic inefficiencies and lack of transparency, often stretching beyond five years or more before being routinely rejected (without justification), necessitating the applicant to reapply.

Furthermore, stateless applicants who are unsuccessful by the age of 21 do not have a pathway to apply for citizenship, leaving them without remedy to their situation<sup>664</sup>.

Advocates for Non-Discrimination and Access to Knowledge (ANAK), an NGO based in Sabah, has a support group for young stateless adults in Sabah. Most individuals affected by statelessness within this group fall within the age range of 18 to 25 years. This age period is usually a crucial time for young adults who have just been aware of their legal documentation issue and the consequences of it. Hence, this is when they would take the initiative to get their legal documentation sorted out.

Several factors contributed to their stateless status. First, many of their parents lacked the knowledge and understanding required to apply for citizenship on their behalf. Secondly, some parents failed to register their marriage before the birth of their children, resulting in the classification of their offspring as illegitimate. Additionally, late birth registration and the absence of crucial documentation play a significant role in the statelessness issue faced by these young adults.

*"Statelessness is not just about the absence of a Blue IC; it's about the absence of belonging, dignity, and the right to be recognized as a member of society."*

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663 Amalia Azmi, 'Family Frontiers urge govt to review proposed amendments to citizenship provisions in constitution' (New Straits Times, 1 September 2023) <<https://www.nst.com.my/news/nation/2023/09/949884/family-frontiers-urge-govt-review-proposed-amendments-citizenship>> accessed 25 February 2024

664 Mohd Iskandar Ibrahim, 'Constitutional amendment on citizenship to be comprehensive: Home minister' (New Straits Times, 22 June 2023) <<https://www.nst.com.my/news/politics/2023/06/923039/constitutional-amendment-citizenship-be-comprehensive-home-minister>> accessed 25 February 2024

## What Are the Numbers and Who Are They?

Over the last decade alone, government administrations have faced criticism for their insufficient efforts in tackling statelessness within a minority ethnic group, i.e. the Indians. Popularly referred to as the pre-independence context of statelessness, it was most reported among the Indian minorities in West Malaysia. The volume and extent of the pre-independence population without citizenship were often a political debate leading up to estimating over 300,000 Malaysian Indians impacted without citizenship<sup>665</sup>. The mapping and registration exercise by the Development of Human Resources for Rural Areas (DHRRA) was crucial in quantifying the baseline volume of minorities of the pre-independence context without citizenship. Through its legal empowerment approach, DHRRA's community-based paralegal program recorded 12,392 stateless individuals between 2014 to June 2017<sup>666</sup>. The baseline data gathered provided a platform to effectively engage government agencies on the urgency to address the issue.

The historical issue of statelessness among the elderly population appears to be merely the tip of the iceberg. Gaps in nationality laws have led to the emergence of different categories of in-situ stateless<sup>667</sup> individuals in Malaysia. Notably childhood statelessness among Malaysian families was contributing to the largest proportion of statelessness in Malaysia, such as children born out of wedlock, adopted stateless children, abandoned and foundling children in Malaysia, etc.

According to the mapping and registration exercise conducted by DHRRA, stateless individuals and those at risk of statelessness in the country can be classified into the following groups<sup>668</sup>:

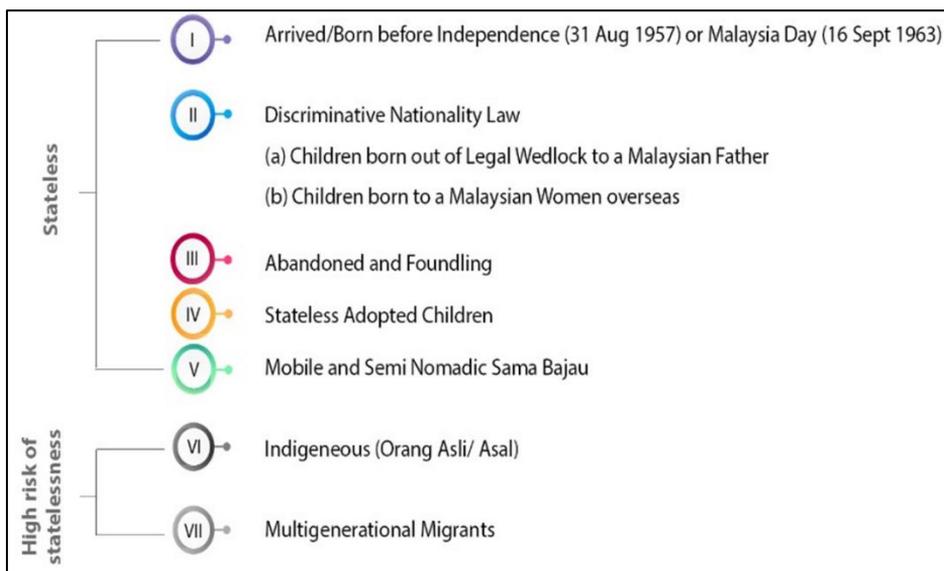
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665 'Ramasamy: Tell us how many Indians are stateless if 300,000 figure is wrong' (Free Malaysia Today, 1 November 2017) <<https://www.freemalaysiatoday.com/category/nation/2017/11/01/ramasamy-tell-us-how-many-indians-are-stateless-if-300000-figure-is-wrong/>> accessed 25 February 2024

666 Saravanan M Sinapan, 'LETTER | Statelessness will remain unresolved until the NRD policy is addressed' (Malaysiakini, 15 December 2020) <<https://www.malaysiakini.com/letters/555350>> accessed 25 February 2024

667 Chin Low, C. (2017). Report on citizenship law: Malaysia and Singapore. [online] Fiesole, Italy: European University Institute. Available at: [https://cadmus.eui.eu/bitstream/handle/1814/45371/GLOBALCIT\\_CR\\_2017\\_03.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/45371/GLOBALCIT_CR_2017_03.pdf?sequence=1&isAllowed=y)

668 DHRRA Malaysia. Report: Statelessness in Malaysia. Available at: [https://dhrmalaysia.org.my/wp-content/uploads/2022/04/STATELESSNESS-IN-MALAYSIA-REPORT-05042022\\_compressed.pdf](https://dhrmalaysia.org.my/wp-content/uploads/2022/04/STATELESSNESS-IN-MALAYSIA-REPORT-05042022_compressed.pdf)



*Categories of Statelessness Based on DHRRA's Mapping & Registration Exercise<sup>669</sup>*

In the East Malaysian state of Sabah, the Indigenous seafarers mainly from the Bajau Laut community and many street children also remain stateless<sup>670</sup>.

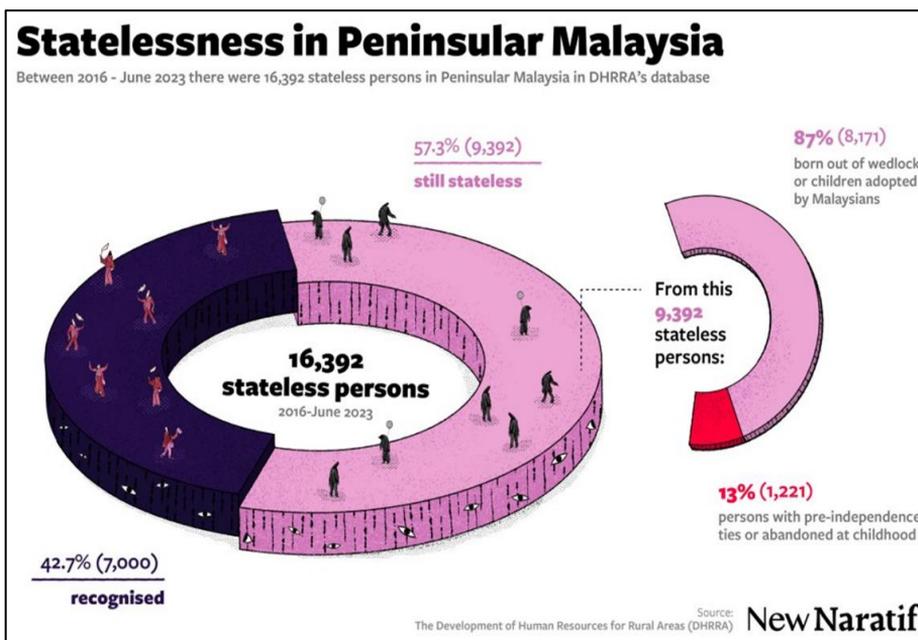
According to the latest statistics from the mapping exercise done by DHRRA, over 16,392 stateless persons in West Malaysia were registered with the organisation from 2016 to June 2023<sup>671</sup>; an estimated 7,000 have been recognised as Malaysians while the remaining 9,392 remain stateless<sup>672</sup>. Among them, 8,389 cases are currently categorised as childhood statelessness.

669 DHRRA Malaysia and Commonwealth Foundation. Gender-equal nationality law: Reducing statelessness in Malaysia. Available at: [https://dhreramalaysia.org.my/wp-content/uploads/2022/04/Gender-Equal-Nationality-Law\\_compressed.pdf](https://dhreramalaysia.org.my/wp-content/uploads/2022/04/Gender-Equal-Nationality-Law_compressed.pdf)

670 Hui Yee Chiew, 'An invisible jail' - stateless children in Malaysia' (Malaysiakini, 20 May 2019) <<https://www.malaysiakini.com/news/387600>> Accessed 25 February 2024

671 'Amendments to nationality law must prioritise protection of Malaysian families — Development of Human Resources for Rural Areas (DHRRA) Malaysia' (Malay Mail, 2 November 2023) <<https://www.malaymail.com/news/what-you-think/2023/11/02/amendments-to-nationality-law-must-prioritise-protection-of-malaysian-families-development-of-human-resources-for-rural-areas-dhrra-malaysia/99792>> accessed 25 February 2024

672 Ida Lim, 'Counting Malaysia's 'invisible' people: How many born here cannot be citizens despite their local roots' (Malay Mail, 10 July 2023) <<https://www.malaymail.com/news/malaysia/2023/07/10/counting-malysias-invisible-people-how-many-born-here-cannot-be-citizens-despite-their-local-roots/78296#:~:text=Of%20the%209%2C392%2C%20the%20biggest,Malaya's%20independence%20in%201957%20but>> accessed 25 February 2024



*Statelessness in Peninsular Malaysia (Photo: New Naratif<sup>673</sup>)*

This is also prevalent among various ethnic and indigenous communities in the Borneo region of Malaysia, Sabah and Sarawak, up to the present day.

Sabah has the highest stateless population in Malaysia<sup>674</sup>. In 2022, Sabah Chief Minister Hajiji Noor stated in the State Assembly that 810,443 or 23.7% of Sabah's population of 3,418,785 comprised non-citizens<sup>675</sup>. The issue of statelessness is highly sensitive and politicised in Sabah.

Stateless persons are synonymous with irregular migrants and are stigmatised, with the media also perpetuating negative sentiments on the issue. Politicians played a large part in shaping the narrative, as many use the issue as a political tool and those who speak up on the issue will receive backlash and lose public support. The statelessness issue is also looked at through a very narrow lens of national security due to the alleged impact of 'Project IC' and the Lahad Datu Intrusion in 2013<sup>676</sup>.

<sup>673</sup> 'The constitutional amendment creep: Perpetuating statelessness in Malaysia' (New Naratif, 30 August 2023) <<https://newnaratif.com/the-constitutional-amendment-creep/>> accessed 25 February 2024

<sup>674</sup> Daron Benjamin Loo and Linda Lagason (2022). Framing the stateless children in Sabah: An examination through corpus analysis. *International Journal of Asia Pacific Studies*, 18(2): 201–226. Available at: <https://doi.org/10.21315/ijaps2022.18.2.9>

<sup>675</sup> Durie Rainer Fong, 'Almost a quarter of Sabah residents are non-citizens, assembly told' (Free Malaysia Today, 24 March 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/03/24/almost-a-quarter-of-sabah-residents-are-non-citizens-assembly-told/>> accessed 25 February 2024

<sup>676</sup> Aime Marisa Chong, Stephanie Joseph Benedict and Mary Anne K. Baltazar, 'Sabah's stateless issue: Navigating a complex legal landscape for basic rights' (Hurights Osaka, March 2023) <<https://www.hurights.or.jp/archives/focus/section3/2023/03/sabahs-stateless-issue-navigating-a-complex-legal-landscape-for-basic-rights.html>> accessed 25 February 2024

Currently, the known populations who are stateless are those born out of wedlock from mixed marriages whereby the father is a Malaysian and the mother is a foreigner, children who are born before the legally registered marriages, children of stateless persons and children from traditionally nomadic communities<sup>677</sup>. Sabah Indigenous communities who face geographical challenges are also at risk of statelessness if they fail to register their birth.

Some efforts to reduce statelessness include the Mobile Court Programme which was started in 2007 by the Malaysian Judiciary<sup>678</sup>. It provides regular court services in rural areas of Sabah with one of their goals being to mitigate issues on legal documentation within the rural communities by working together with the NRD. This shows the prominent issue of legal documentation within the state. Large numbers of people remain without a birth certificate, unconfirmed or without a nationality. Of particular concern are the Bajau Laut (Sama Dilaut), who are a collection of various semi-nomadic populations living in boats or in stilt houses in coastal areas or on islands. Their living conditions make it difficult for them to register births or obtain related documents.



*Saifuddin Nasution, Minister of Home Affairs (left), speaking about the special taskforce's upcoming work at Long Singut in Sarawak to help the local community there with registration and documentation. Also seen are Minister of Women, Childhood and Community Wellbeing Dato Sri*

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677 Ida Lim, 'Why Malaysia-born illegitimate children with foreign mothers are stateless' (Malay Mail, 27 March 2019) <<https://www.malaymail.com/news/malaysia/2019/03/27/why-malaysia-born-illegitimate-children-with-foreign-mothers-are-stateless/1736828>> accessed 25 February 2024

678 'How the mobile court works' (Daily Express, 3 December 2017) <<https://www.dailyexpress.com.my/news.cfm?NewsID=121469>> accessed 25 February 2024

*Fatimah Abdullah (centre) and Deputy Minister of Women and Childhood Development Datuk Rosey binti Haji Yunus (Photo: Dayak Daily<sup>679</sup>)*

Whereas in Sarawak, it was reported that several contributing factors include unregistered marriages, unregistered adoptions, abandonment by non-citizen biological mothers, post-birth marriage registration, and unregistered births after divorce. The causative factors leading to statelessness in Sarawak was uncovered through a thorough study titled "A Comprehensive Study on the Causative Factors Leading to Stateless Children in Sarawak," conducted by the Sarawak Social Development Council (*Majlis Pembangunan Sosial Sarawak*, MPSS) in partnership with a specialised research team from Universiti Malaysia Sarawak (UNIMAS) in 2021.

The increased numbers of stateless children and awareness of the discrimination against children born pre-marriage being denied access to citizenship led to several initiatives led by Sarawak's Ministry of Women, Childhood and Community Wellbeing Development (KPWK) collaborating with the Ministry of Home Affairs (KDN)<sup>680</sup>. Recently, a dedicated task force was established to address the issue of individuals lacking identification documents in the state in July 2023<sup>681</sup>.

### **What is the Government's Stance on Statelessness in Malaysia?**

**A typical parliamentary response on statelessness:** Malaysian government officials have repeatedly rejected claims about the presence of stateless individuals in the country. For instance, in 2015, former Home Minister Datuk Seri Dr Ahmad Zahid Hamidi denied the existence of stateless persons in Malaysia<sup>682</sup>. Similarly, on June 7, 2023, the Home Ministry asserted that the term "stateless" typically refers to someone without citizenship from any country, suggesting that, based on this definition, no stateless person could have entered Malaysia<sup>683</sup>. All this is nothing but a blatant refusal to acknowledge the presence of stateless individuals in Malaysia.

The government's stance on statelessness has been inconsistent, as evidenced by numerous occasions where it has contradicted itself.

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679 'Special task force focused on preventing statelessness heading to Long Singut, Kapit, to help with documentation issue' (Dayak Daily, 9 March 2023) < <https://dayakdaily.com/special-taskforce-focused-on-preventing-statelessness-heading-to-long-singut-kapit-to-help-with-documentation-issues/> > accessed 25 February 2024

680 'Addressing Sarawak's issue of stateless children' (New Sarawak Tribune, 22 August 2023) <<https://www.newsarawaktribune.com.my/addressing-sarawaks-issue-of-stateless-children/>> accessed 25 February 2024

681 'Special task force to handle issue of 'stateless' people in Sarawak' (The Star, 25 July 2023) <<https://www.thestar.com.my/news/nation/2023/07/25/special-task-force-to-handle-issue-of-stateless-people-in-sarawak>> accessed 25 February 2024

682 'No stateless people, says Zahid' (Daily Express, 20 April 2015) <<https://www.dailyexpress.com.my/news.cfm?NewsID=99073>> accessed 25 February 2024

683 Ida Lim, 'https://www.malaymail.com/news/malaysia/2023/07/11/why-malaysia-has-zero-data-on-stateless-persons-decoding-the-official-view-through-parliaments-lens/78931#' (Malay Mail, 11 July 2023) <<https://www.malaymail.com/news/malaysia/2023/07/11/why-malaysia-has-zero-data-on-stateless-persons-decoding-the-official-view-through-parliaments-lens/78931#>> accessed 25 February 2024

Election manifestos of several elected governments since 2018 have unequivocally pledged to address statelessness among various affected populations. However, many of these commitments have failed to materialise into concrete actions. Disappointingly, upon assuming office, ministers often deviate from these promises and downplay the existence of stateless persons, potentially influenced by official government narratives.

<p> <b>JAWATANKUASA KABINET BAGI KEHORMATAN INSAN (INSANI) UNTUK MENYELESAIKAN SEMUA KES ANAK TIDAK SAH TARAF DAN KANAK-KANAK TANPA DOKUMEN DAN HAK MEREKA MENDAPATKAN PENDIDIKAN.</b></p> <p><b>MEMINDA PERLEMBAGAAN PERSEKUTUAN DAN UNDANG-UNDANG BERKAITAN BAGI MEMASTIKAN HAK KEWARGANEGARAAN KEPADA ANAK YANG DILAHIRKAN WANITA MALAYSIA DI LUAR NEGARA.</b></p>	 <p><b>BN</b></p>	<p> <b>KEWARGANEGARAAN MELALUI PENDAFTARAN MELALUI ARTIKEL 15(2) KEPADA ANAK-ANAK YANG DILAHIRKAN DI MALAYSIA DARIPADA SALAH SEORANG IBU BAPA WARGANEGARA MALAYSIA</b></p> <p><b>KEWARGANEGARAAN MALAYSIA SECARA AUTOMATIK UNTUK KANAK-KANAK YANG DILAHIRKAN DI LUAR NEGARA OLEH IBU WARGANEGARA MALAYSIA</b></p> <p><b>KEWARGANEGARAAN MALAYSIA SECARA AUTOMATIK UNTUK ANAK ANGGAT</b></p> <p><b>KEWARGANEGARAAN MALAYSIA SECARA AUTOMATIK BAGI GOLONGAN WARGA EMAS (60 TAHUN) YANG MEMPUYAI SEKURANG-KURANGNYA SEORANG ANAK YANG BERSTATUS WARGANEGARA MALAYSIA.</b></p> <p><b>MASALAH TIADA KEWARGANEGARAAN MASYARAKAT INDIA (STATELESS INDIANS) DAN MASYARAKAT LAIN, YANG ARAN DISELARASKAN MELALUI BATU JAWATANKUASA KHAS DI BAWAH JPM (JAWATANKUASA PILIHAN KHAS DI PARLIMEN.)</b></p> <p><b>BAHAGIAN 'MENYELESAIKAN PELBAGAI ISU KEBANJIRAN WARGA ASING DI SABAH' - PASUKAN PETUGAS UNTUK MENANGANI SITUASI DOKUMENTASI SABAH</b></p>	
<p> <b>KETIADAAN PEMBAHARUAN DALAM SOP (KDN) UNTUK MEMPROSES PERMOHONAN KEWARGANEGARAAN YANG MENJADI BATU PENGHALANG YANG LEBIH BESAR</b></p> <p><b>TIADA PENJELASAN DALAM KATEGORI KANAK-KANAK TANPA DOKUMEN, SAMA ADA PENGANGKATAN DAN TERABAI TERMASUK DALAM USAHA MEREKA UNTUK MENANGANI ISU INI</b></p>		<p> <b>KETIADAAN PEMBAHARUAN DALAM SOP (KDN) UNTUK MEMPROSES PERMOHONAN KEWARGANEGARAAN YANG MENJADI BATU PENGHALANG YANG LEBIH BESAR</b></p> <p><b>TIADA JAMINAN KEWARGANEGARAAN BAGI ANAK DAPAT (KANAK-KANAK BARU LAHIR YANG DIJUMPAI TERBIAR)</b></p>	
<p><b>DHARRA MALAYSIA</b> BUILDING RESILIENT COMMUNITIES Hasil tinjauan keseluruhan tentang janji-janji yang akan menyumbang ke arah menangani isu tanpa kewarganegaraan (Stateless) di Malaysia</p>		<p><b>DHARRA MALAYSIA</b> BUILDING RESILIENT COMMUNITIES Hasil tinjauan keseluruhan tentang janji-janji yang akan menyumbang ke arah menangani isu tanpa kewarganegaraan (Stateless) di Malaysia</p>	

The various 'newly minted' governments appeared to understand statelessness and different citizenship rights plaguing children born or adopted by Malaysians, albeit briefly. This includes the government's purported proposals to amend citizenship laws. Furthermore, the government persists in propagating narratives that portray stateless individuals as migrants seeking Malaysian citizenship, rather than acknowledging the complexities and nuances of their situation.



*#HanyaMalaysiaTanahAirku Campaign Quotes Depicting the Ordeal of a Stateless Person*

The Federal Constitution includes multiple provisions aimed at preventing statelessness within the country, while Federal Court judges have extensively analysed and researched the historical context and intentions behind the formation of the Federal Constitution to address statelessness through various judgments<sup>684</sup>.

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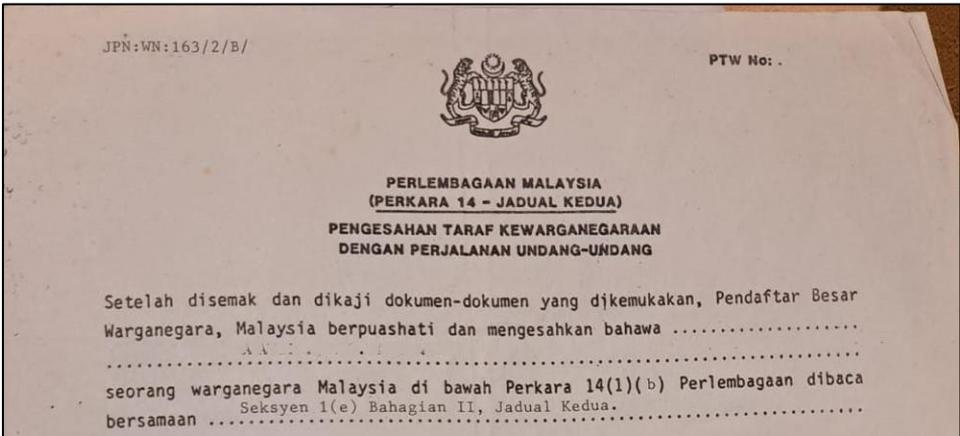
684 Jasmine Wong et al, 'LETTER | Upholding the spirit to prevent statelessness' (Malaysiakini, 18 September 2023)

<<https://www.malaysiakini.com/letters/679439>> accessed 25 February 2024



Photo: The Sun Daily

It has come to light, as indicated by various historical sources sighted by DHRRA, that the government had indeed issued Permanent Residence Identity Cards to stateless individuals.



Evidence sighted by DHRRA, on Section 1(e) being implemented in the NRD to prevent statelessness in the 1990s

Furthermore, it has been documented that, during the 1990s, the NRD granted automatic citizenship to stateless adopted children via Section 1(e) of Part II Second Schedule. This constitutional provision was implemented and served as a safeguard, ensuring that stateless individuals born in Malaysia could obtain citizenship without having to resort to judicial avenues for redress. However, there appears to be a lack of clarity regarding the point at which the NRD, under the auspices of the Home Ministry, departed from adhering to the laws outlined in the Federal Constitution.

To this day, the government persists in issuing travel documents known as Certificate of Identity<sup>685</sup> for stateless permanent residents through an immigration process. These single-use travel documents enable stateless individuals to travel internationally and access essential services, despite their lack of formal citizenship status.

### **Recommendations In Regard to the Government's Proposed Citizenship Amendments:**

CSOs, activists and impacted persons working on statelessness and citizenship rights have urged the Home Ministry to separate the proposed amendment package into two distinct parts:

1. Proceed with the change and confer automatic citizenship to children born abroad to Malaysian women.
2. Postpone the five amendments that aim to remove current citizenship rights until all effects and implications have been thoroughly examined.

To ensure a thorough review and address the root causes of statelessness and unequal access to citizenship, we propose the establishment of an independent task force comprising stakeholders, subject matter experts, and individuals directly affected<sup>686</sup>.

Adequately address laws and policies that perpetuate statelessness through several steps:

- Address the rising situation of statelessness in Malaysia through a 'Statelessness Determination Procedure' to identify, recognise and prioritise access to citizenship among vulnerable stateless adults and children.
- Resolve the status of individuals who hold permanent residency in Malaysia but lack Malaysian citizenship or citizenship from any other country.
- Ensure that all children, including those who are stateless or at risk of statelessness, such as foundlings and adopted children, are granted citizenship without any form of discrimination in accordance with Malaysia's constitutional provisions to prevent statelessness.
  - a. Guarantee the full implementation of existing protections outlined in the Federal Constitution to ensure that every child born in Malaysia, regardless of their parents' gender, ethnicity, documentation, or immigration status, is granted Malaysian nationality, particularly if they would otherwise be stateless.
  - b. The NRD must issue administrative guidelines and procedures to implement Section 19(B) of Part II of the Second Schedule that recognises newborn foundlings as citizens of Malaysia.

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685 Further information can be found here: <https://www.malaysia.gov.my/portal/content/30383>

686 The demand is in the petition: [https://www.change.org/t/citizenship-amendment-malaysia-en-gb?source\\_location=topic\\_page](https://www.change.org/t/citizenship-amendment-malaysia-en-gb?source_location=topic_page)

## Being born out of wedlock is **no reason** to deny citizenship



Malaysia



Barbados

Malaysia is one of last 2 countries in the WORLD that denies Men to pass on citizenship to their children born out of wedlock

This can create statelessness where children cannot acquire nationality from their mothers, for example:

1 Mother herself is stateless

2 Mother Identity is Unknown/  
Cannot be traced

3 Law's of the mother's country does not permit her to confer citizenship in certain circumstances

HRRA MALAYSIA BUILDING RESIDENT COMMUNITIES

- Tackle discriminatory legislation aimed at children born outside of marriage or before their parents' official union, ensuring their access to citizenship through reforming the law with regards to Section 17 of Part III of the Second Schedule of the Federal Constitution to grant children born outside of a legally recognised marriage the right to inherit the Malaysian father's citizenship.
- Enhance administrative processes to facilitate the acquisition or verification of citizenship, and reduce the high application costs for claims to citizenship.
- Address the discriminatory attitudes of the nationals towards the Bajau Laut community and create national policies that focus on inclusivity.
- Withdraw all reservations to the Convention on the Right of the Child (CRC), the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD), particularly concerning the right to a nationality, and accede to all relevant human rights, refugee and statelessness instruments.



*Petition to Urge Members of Parliament to Reject the Regressive Citizenship Amendments*



INDIGENOUS PEOPLES

# SPECIAL FEATURE 2: INDIGENOUS PEOPLES

*Author: Rizuan Tempek  
Peer Reviewer: Colin Nicholas*

## Introduction

Orang Asli is a collective term used to refer to the Indigenous Peoples of Peninsular Malaysia, which means original or first peoples in Malay. There are currently some 18 Orang Asli ethnic groups, with a total population of 209,575 who are widely considered to be the original inhabitants of Peninsular Malaysia, in the sense that they pre-date the arrival of the Malays. Orang Asli communities are generally divided into three distinct groupings: Negrito, Senoi and Proto-Malay<sup>687</sup>.

## Background on Orang Asli Human Rights Situation

In 2018, the Malaysian government through the Legal Affairs Division in the Prime Minister's Department (BHEUU) published the National Human Rights Action Plan (NHRAP)<sup>688</sup>, in which Core Area 4 spells out the Indigenous rights of the Orang Asli communities. However, Item 3 of that section of the Report refers to the demarcation of Orang Asli settlements or areas, which fails to expressly take into account or recognise that

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687 Orang Asli have distinct customs, cultural practices, and way of life when compared to the mainstream or general population in Malaysia. But as Indigenous Peoples, Orang Asli's customs, cultural practices and way of life are closely related and highly dependent on customary land inherited, used, preserved, managed and governed by the local community for generations. The Orang Asli population is the smallest but Orang Asli hold the highest rate of poverty. The UN report released in 2016 states that 34 percent of Orang Asli households are poor, despite the official figure that states only 0.6 percent. The Orang Asli were mostly ignored during the Portuguese and Dutch occupation. However, the British paid more attention towards the Orang Asli during their colonization. The Orang Asli had become subjects to anthropological studies and were targeted by Christian missionaries until the year Emergency (1948-1960) was declared in Malaysia. As part of the war strategy to fight the communists, the Orang Asli were relocated to new settlement areas. This has caused the Orang Asli to lose their lives, lands and resources which defines their distinct culture. Since 1961, the Malayan government then adopted a policy to integrate the Orang Asli to the wider society in order to improve the socio-economic status of the Orang Asli. This continues since then in modern Malaysia. However, the policy is seen to emphasize on the assimilation of the Orang Asli community to the Malay community. Furthermore, the policy is also an attempt to Islamize the Orang Asli in Malaysia. Until today, the Orang Asli continues to be subjugated and discriminated by the dominant society in Malaysia. They have continuously defended and protected their culture and the ownership of their customary land. However, attempts to defend their ancestral and cultural land rights were met with hard actions by the government. Sadly, the threats towards the Orang Asli defenders have reached a new height of seriousness within the community. Despite the international call to recognise the importance to protect the rights of all Indigenous people through the "United Nations Declaration on the Rights of the Indigenous Peoples" (UNDRIP), minimal government support and legal protection were given to the Orang Asli. In fact, the Human Rights Commission of Malaysia (SUHAKAM) has received many complaints on the various land encroachment, land grabbing and land developments that has affected the Orang Asli communities here.

688 <http://www.bheuu.gov.my/index.php/perkhidmatan/pelan-tindakan-hak-asasi-manusia-2018>

the government should survey the entire perimeter of native customary land areas and not just the settlement areas.

The definition for Orang Asli customary land has been sufficiently explained in various publications, such as in the SUHAKAM Report of The National Inquiry into The Land Rights of Indigenous Peoples 2013<sup>689</sup>.

As of 2023, the Orang Asli have yet to receive any updates and information from the government regarding the area of Orang Asli customary land or even settlements that have been surveyed by the government, despite the fact that these survey works should supposedly be classified as a medium-term plan under the NHRAP.

In 2018, Datuk Ismail Sabri, the Minister of Rural and Regional Development, stated that the entire area of Orang Asli land was 134,440.99 hectares. Of these officially acknowledged lands, 32,779.37 hectares had been gazetted, or in other words, protected by written law. Another 19,870.08 hectares had been approved but were not yet gazetted, while the total amount of land pending application for gazettal was 74,838.86 hectares. Occupied land without any official application was stated to be 5,142.73 hectares while 1,809.95 hectares of officially acknowledged Orang Asli land had been granted individual property titles<sup>690</sup>.

In 2023, the Malaysian government through the Deputy Minister of Rural and Regional Development, YB Datuk Hajah Rubiah binti Wang, has made an announcement that the government will survey and gazette Orang Asli reserves but limited for settlement areas<sup>691</sup>. The reason given is that the gazettement will protect the government land from Orang Asli encroachment. The statement went against historical facts and court judgements that have proven that the Orang Asli have existed, occupied, used, conserved and controlled their native customary land since time immemorial, even before the formation of Malaysia.

This announcement is contrary to the manifesto of Pakatan Harapan (PH), which won the 15th General Election and has formed the current coalition government. Referring to Article 30 of the PH manifesto, which is entitled to defend the fate of the Indigenous Peoples of Sabah & Sarawak and Peninsular Malaysia). Clearly and in writing, PH has promised that they will ensure that the rights of Indigenous peoples as contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) will be defended and fought for. PH also mentioned core issues such as Strengthening Customary Land Rights, Establishing Customary Land Tribunals, Submission/Handing of Land Grants to Orang Asli, and Adopting the principle of Free, Prior and Informed Consent (FPIC)<sup>692</sup>.

As a result of non-recognition of Orang Asli customary land and no moratorium on customary land encroachment pending official land demarcation and gazettement, land

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689 <https://suhakam.org.my/ms/publications/national-public-inquiry-reports/>

690 <http://www.bernama.com/bm/am/news.php?id=1441259>

<https://www.bharian.com.my/berita/nasional/2018/02/385849/segera-warta-tanah-rizab-orang-asli-ismail-sabri>

691 <https://www.youtube.com/watch?v=TIGpysXEP28>, the announcement starts at 1:36:54

692 <https://ecentral.my/manifesto-ph-tawaran-harapan-pru15/>

disputes between Orang Asli, government and developers/companies are still ongoing. The following are the issues that occur throughout the period from 2018 to 2023:

## 1. Johor

The Sultan of Johor has decreed that all Orang Asli land in the state of Johor to be placed under the Sultanate Land Enactment. According to the Sultan, this is to protect the land from being exploited by the Orang Asli and to control Orang Asli from encroaching on forest reserves and government land<sup>693</sup>.

In response to this decree, more than 200 Orang Asli representing Jaringan Perkampungan Orang Asli Johor (JPOAJ) protested peacefully outside the Office of the Johor Menteri Besar (Chief Minister). The Orang Asli who were present submitted a memorandum of objection against the decree that the entire Orang Asli native customary land be placed under the Sultanate Land Enactment<sup>694</sup>.

The State Government through the Menteri Besar and Orang Asli Development Department (JAKOA) has issued a statement that fully supports the Sultan's decree. The Menteri Besar stated that any area that will be gazetted as sultanate land is (actually) not the personal property of the sultan. This is only a step so that the Sultan can protect the land from exploitation or abuses<sup>695</sup>.

Currently the Johor state government, JAKOA and the Sultan have not held any follow-up meetings with JPOAJ to discuss this issue openly and transparently. The main concern of the Orang Asli is that native customary land will become the absolute property of the Sultan. When the native customary land is fully under the Sultanate Land title, Orang Asli will also be restricted from seeking justice in court. This will further erode the only channel (filing for Orang Asli customary land dispute court case) that Orang Asli can take when all else fails to protect Orang Asli customary land.

Even worse, after this protest was made, the state government through its agencies, have posted eviction notices in Orang Asli customary land. This alluded that the government has no empathy with the grievances of the Orang Asli. Orang Asli affected by this eviction notice said that they are disappointed and they feel unsafe with the backlash from the government.

In the beginning of 2024, according to a representative from JPOAJ, the situation has not improved. The palace and state government are only engaging with Orang Asli who are biased towards the government and palace. This situation is also an indication that the Orang Asli headmen or Tok Batin who are selected and appointed by the government are on the side of the government and not in favour of the Orang Asli and the fundamental rights of the Orang Asli.

## 2. Kelantan

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693 <https://www.astroawani.com/berita-malaysia/sultan-johor-titah-cadangkan-tanah-orang-asli-dijadikan-tanah-kesultanan-412468>

694 <https://www.malaysiakini.com/news/664375>

695 <https://www.astroawani.com/berita-malaysia/sultanate-land-bukan-maksud-tanah-milik-peribadi-sultan-mb-johor-414155>

In Kelantan, the Nenggiri dam project will submerge the settlements and native customary land of several villages. Kampung Pos Tohoi, Kampung Pos Pulat, Kampung Wias and Kampung Bering will totally be underwater if this project takes place. A total of 1,185 people from 217 families will be moved to other areas, namely Kampung Kuala Yai and 18 other villages will be affected indirectly because the forest area and native customary land will also be submerged. The total area of Orang Asli native customary land in Gua Musang that will be submerged by the Nenggiri dam project is 5384 hectares<sup>696</sup>.

The Kelantan State Government and Tenaga Nasional Berhad (TNB) said that the Nenggiri dam will provide benefits for the people of Kelantan, including Orang Asli. They also said that the dam is in line with the 2030 Sustainable Development Goals (SDG) Agenda by the United Nations (UN). However, according to Mustafa Along from Kelantan Orang Asli Village Network (JKOAK), the state government and TNB have not given a clear guarantee that this project will not have a negative impact on the environment and the lives of Orang Asli<sup>697</sup> like it did in Bakun, Sarawak and Temenggor, Gerik, Perak.

### 3. Perak (North)

The dam project in Temenggor Dam in Gerik, Perak has affected Orang Asli negatively. Orang Asli had to change their way of life and were forced to adapt to the changed environment. Some villages reiterated that they are prohibited to fish more than allowed. They had to use boats to travel, which is costly. They were also forced to relocate to areas where the resource is scarce. They also have to deal with the threat of hostile wild animals such as elephants, tigers and bears due to habitat conflicts. There were even deaths recorded due to elephant attacks. The Government and its agencies have not taken any initiative to resolve the conflict and issues in Gerik, especially the human – animal conflict<sup>698</sup> and based on that track record, how is it going to be any different if a new dam is built in any Orang Asli native customary land?

### 4. Perak (South)

Malaysia still depends on logging to generate the national economy. Despite frequent objections made by Orang Asli, the developers, state governments and forestry are still actively pursuing logging projects. For example, in Kampung Chang Lama Sungai Gepai, Kampung Chang Baru, Kampung Senta and Kampung Pos Gedong in Bidor, Perak, the Forestry Department informed Orang Asli that their customary land, which is recognised as Bukit Tapah Forest Reserve, had been approved for a logging project. The Orang Asli from these villages immediately rejected the logging project because it has no benefit for Orang Asli and has so many risks; one of the risks cited landslides and loss of lives occurred in Pos Gedong in 1986 due to protracted logging. The village headman (Tok Batin) of Kampung Chang Lama Sungai Gepai voiced his

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696 <https://www.malaysiakini.com/news/623887>

697 Ibid

698 <https://www.thesundaily.my/cerita/berita/wanita-orang-asli-patah-tangan-kaki-diserang-gajah-liar-di-gerik-FN9528447>

frustration by saying that the Malaysian government still does not care despite multiple objections made by the Orang Asli against logging<sup>699</sup>.

In May 2023, the community of Kampung Chang Lama Sungai Gepai was shocked by another issue of customary land encroachment. Their customary area has been cleared by invaders who refused to reveal their identities. There are no official company signs placed in the area. When the community representative went to the site of the encroached area to confront the intruder, the intruder fled. The community made a police report and a complaint to the assemblyman. The community has also written and submitted a protest letter to JAKOA and the state government. In addition, the community has also made a blockade to prevent the intruders from entering this area.

Incidents like this will continue to happen as long as the Orang Asli customary land is not legally recognised.

## 5. Negeri Sembilan

Most recently in Negeri Sembilan, seven (7) villages reported that their native customary land area has been proposed for logging projects. Roads leading to logging compartments are being built without FPIC by Orang Asli to be affected by the project. The community involved has started a protest process to stop this project<sup>700</sup>. They have uploaded pictures of meetings they had with JAKOA and the logging company.

### Orang Asli and Animal Habitat Conflict

As of November 2023, 6 incidents of tiger attacks on humans have been recorded. 4 of the victims of this attack are Orang Asli in Gua Musang. Other dangerous wild animals include elephants and bears. Although PERHILITAN reported this incident and carried out monitoring work, they did not explain the real cause of this incident and why tigers moved to areas inhabited by humans and hunted humans as their prey<sup>701</sup>.

According to Orang Asli representatives from the Kelantan Orang Asli Village Network (JKOAK), incidents of tiger attacks against Orang Asli rarely happened before the forest in the Gua Musang area was cleared for a large-scale logging project followed by monoculture farming of the Ladang Rakyat Project.

Deforestation and ecosystem damage cause animals to lose their habitat. Many animals leave their habitats to find new habitats. Areas that used to be where the Orang Asli hunted certain animals for food are now just barren land or have become palm oil plantations or rubber plantations.

Orang Asli elders also voiced their concerns with the installation of monitoring cameras or infrared cameras in the forest. According to them, this activity disturbs the tranquility of animals, especially tigers because the light from this camera disturbs their nocturnal

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699 <https://www.astroawani.com/berita-malaysia/masyarakat-orang-asli-bidor-bantah-cadangan-aktiviti-pembalakan-371667>

700 <https://www.facebook.com/photo?fbid=6285982294782891&set=pcb.6285982488116205>

701 <https://www.malaymail.com/news/malaysia/2023/12/09/orang-asli-group-urges-kelantan-govt-to-review-forestry-and-wildlife-laws-says-uncontrolled-land-clearing-putting-lives-at-risk/106657>

activities. Although this statement may be considered unfounded, an in-depth study should be done because the Orang Asli community of Gua Musang also stated that the frequency of tigers wandering into the village area at night increased after the installation of infrared cameras in the forest.

Relocation of animals from one area to another is also a trend that has negative impacts on Orang Asli and rights to live. Orang Asli in Johor, Pahang, Kelantan and Northern Perak have complained about the transfer of animals from one area to another, especially to the customary land of the Orang Asli has created serious problems for the Orang Asli causing injuries, loss of resources, income and most seriously, deaths.

Orang Asli in Pahang, Johor, Kelantan, North Perak and Pahang have complained that they are now mired in conflict with elephants. These elephants were resettled by PERHILITAN in an area that is considered a PERHILITAN Reserve but located in the customary land of the Orang Asli. These elephants enter the Orang Asli agricultural area and then eat and destroy the Orang Asli crops. This causes the Orang Asli to lose their source of food and income. At the same time, the Orang Asli could not go to the forest to forage resources and forest products because they were worried about the risk of attacks by elephants who now consider the area as their habitat.

### **Freedom of Religion, Religious Conversion and Non-Recognition of Orang Asli's Religion/Beliefs**

In addition to the issue of native customary land disputes, we also received complaints regarding organised religion coercion, especially Islam among Orang Asli.

Outsiders consider Orang Asli to be animist or have no religion. This is why Orang Asli is a target for various organised religion groups and their religious propaganda.

The proselytization movement to change Orang Asli religion or belief system to an organised religion has been happening since the early days when the colonists discovered Orang Asli settlements.

The first example of Orang Asli forced islamization happened to Orang Asli of Temiar tribe in Gerik, Perak. They complained that when they changed or made an identity card for themselves or their children, their religion status was also changed to Islam, even though they never uttered the Kalimah Syahadah to convert to Islam. They also complained that their children were taught Islamic subjects in school without parental permission even though their children were not Muslim<sup>702</sup>.

When the Orang Asli involved dealt officially with the officers in the Registration Department to revoke the Islamic status from their identity card, they were referred to other departments such as JAKOA, the State Department of Islamic Religion and the District Department of Islamic Religion. This issue is not resolved. These departments are afraid to remove the islam status in the affected Orang Asli identity card because they fear

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702 <https://www.malaymail.com/news/malaysia/2019/07/09/orang-asli-demand-to-be-left-alone-by-islamic-preachers/1769761>

the repercussion of apostasy when it is their intent and or negligence that put Orang Asli in this conundrum.

Another example of a forced Islam conversion case involved 137 Orang Asli of the Bateq-Mayah tribe in Kampung Benchah Kelubi, Merapoh, Kuala Lipis, Pahang. After a long silence and dissatisfaction with forced Islam conversion, they finally decided to take legal action and filed a lawsuit against forced Islam conversion at the Kuala Lumpur High Court on 28 September 2022<sup>703</sup>.

### **The Non-Recognition of Orang Asli, including Tradition, Culture, Identity and Language**

The existence of Orang Asli, including identity, culture and language, is still not reflected in the Malaysian mainstream media. If there is, it's just en passant and there is no focus, emphasis and visibility given to educate and promote the identity, culture and language of the Orang Asli to mainstream society. This can be seen through TV ads, TV shows and other media that only focus on the 3 majority races in Malaysia, namely the Malays, Chinese and Indians. The celebration of World Indigenous Peoples Day also did not get enough highlights and attention in Malaysia. It is also not declared as a public holiday and advertised on TV or other media in Malaysia. Although there is some attention given by the government in recent years, it is still not enough and satisfactory.

Orang Asli are also invisible from the school curriculum. Identity, culture and mother tongue of the Orang Asli are not taught in school. When Orang Asli go to school, they only learn about subjects that are foreign to them. Many Orang Asli children do not like going to school because children of other races bully Orang Asli children. This is a contributor to the high dropout rate among Orang Asli children. Although there are initiatives taken by the government such as introducing the 9 Year Comprehensive Special Model School Concept (K9), it is still not enough because Malaysians in general and school children of other races in particular are not educated to accept and have empathy towards the Orang Asli<sup>704</sup>.

### **Little to No Access to Basic Facilities and Amenities**

Orang Asli villages still do not have complete and quality basic facilities and infrastructure, although some of these villages are located just a few kilometres from the town/city. There are recorded villages that still do not have tar roads, do not receive water supply assistance, only have pipes but no running water, or the quality of the water is polluted and poor, no electricity, poor to no telephone network/signal and very limited to no data/internet access, no full-time community health clinic in rural outposts/villages<sup>705</sup>.

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703 <https://www.malaysiakini.com/news/660095>

704 <https://www.malaysiakini.com/news/486026>

<https://berita.rtm.gov.my/index.php/semasa/46914-konsep-sekolah-model-khas-k9-atasi-masalah-keciciran-orang-asli>

705 <https://www.astroawani.com/berita-malaysia/hampir-1000-masyarakat-orang-asli-di-pos-gob-perlu-bekalan-elektrik-289905>

<https://www.malaysiakini.com/news/644569>

Schools for Orang Asli children are also located far from the village and they have to be separated from their families and relocated to boarding schools. This causes Orang Asli children to grow up without the safety and love, attention and guidance of their parents. These children are forced to be independent at a very young age. This is not suitable for children's development and is proven to have a negative impact on children's mental and emotional growth according to the study of Child Development Theory, especially referring to Bowlby's Attachment Theory. Being far away from family and living in a boarding school where the majority is of other races also makes Orang Asli children vulnerable to bullying and Islam indoctrination and conversion<sup>706</sup>.

### **Rising Orang Asli Customary Land Dispute Court Cases**

From the period of 2018 to 2023, there are still Orang Asli deadlock cases that have to be filed in the courts as a last resort to seek justice. In these cases, the government including JAKOA is still on the opposing side as opposed to looking after and protecting the Orang Asli. In addition, the Orang Asli must appoint a lawyer who can help their case and the Orang Asli have to bear all the trial costs of the case.

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706 <https://www.malaysiakini.com/news/496511>

<https://www.hmetro.com.my/mutakhir/2018/01/307089/mereka-dah-lupakan-tragedi-2015>

# MALAYSIA HUMAN RIGHTS REPORT 2023

“Despite what may seem like a bleak picture...*civil society continues to push back, undeterred by restrictions and have gained important victories.* The same holds for Malaysia and the work of organisations like SUARAM...I am convinced that *Malaysia will one day enjoy a free and equal society where human rights are respected,* with the work of SUARAM being fundamental to getting there. *May this vital work continue, to document, hold the government accountable, and inspire others.*”

**Marianna Belalba Barreto,**  
Civic Space Cluster Lead at CIVICUS

After three years of political and socioeconomic uncertainties, the unity government with its proclaimed commitments for reform was a source of hope for many Malaysians, including civil society. Despite increased receptivity to engage on human rights issues and commitments to reform for improved accountability such as the Ombudsman Bill, more remains to be done. Concrete timelines for the passing of long overdue amendments to SOSMA and laws that violate freedom of expression are not yet in sight. Additionally, fundamental reforms such as local government elections and the separation of the Attorney-General and Public Prosecutor offices remain pending. Acts of state intimidation to restrict the exercise of freedom of peaceful assembly continue. Violation of rights and wellbeing of marginalised groups such as migrants, refugees, Indigenous peoples, LGBTQ+ persons and religious minorities remain the status quo. As the government also grapples with climate change, it is paramount that it addresses its human rights implications, including the socioeconomic wellbeing of the most vulnerable.

**Since its first inception in 1999, for 24 years, SUARAM's annual Malaysia Human Rights Report strives to provide a comprehensive and insightful examination of the progress made and challenges facing human rights in Malaysia.**